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NO. _____

IN THE UNITED STATES SUPREME COURT

COVENANT MEDIA OF SOUTH CAROLINA, LLC,

Petitioner,

v.

CITY OF NORTH CHARLESTON, SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether an ordinance that operates as a prior restraint on speech need not contain *any* procedural safeguards to ensure prompt decision-making and access to judicial review merely because the permitting regulation is deemed content-neutral.

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to this proceeding are properly set forth in the case caption. Petitioner Covenant Media of South Carolina, LLC ("Covenant Media" or "Covenant") has no parent corporation and no publicly held company owns ten percent or more of the corporation's common stock.

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## OPINIONS BELOW

The published opinion of the three-judge panel of the Fourth Circuit Court of Appeals is reported as *Covenant Media of South Carolina, LLC v. City of North Charleston*, 493 F.3d 421 (4th Cir. 2007).[1] The opinion and judgment of the district court were unpublished, but was assigned a Westlaw cite at 2006 WL 1967308 (D.S.C. July 12, 2006).

## JURISDICTION

The Court of Appeals entered judgment on July 6, 2007. A petition for rehearing and hearing en banc was denied on August 3, 2007. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech ... "

Section 1983 of Title 42 of the United States Code states that any person that "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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[1] The Appendix attached hereto includes the circuit court decision (1a-38a), and the district court decision (39a-58a).

## STATEMENT

### I. OVERVIEW OF THE CASE

On December 1, 2004, Covenant Media submitted an application for permission to post one advertising sign to the City of North Charleston. (40a). As a result of the City's failure to process or otherwise respond to the application, Covenant filed suit, pursuant to 42 U.S.C. § 1983, against the City on May 12, 2005 alleging that the failure to process the application, and the City's Sign Regulations which plainly allowed such delay, violated Covenant's First Amendment rights. (40a).

The parties moved for summary judgment, with Covenant requesting that the district court establish that the City's conduct in failing to process its initial sign application for over 10 months violated Covenant's constitutional rights and the City seeking summary judgment in its favor as to all claims. (9a). It was undisputed that the Sign Regulations set no time limits for official action and did not require that sign applications ever be responded to. (7a). On July 12, 2006, the court entered judgment for the City, holding that Covenant lacked standing to challenge the unconstitutional aspects of the Regulations either as-applied or pursuant to the overbreadth doctrine. (50a, 55a-57a). Covenant timely appealed. (11a).

On appeal, the Fouth Circuit found that the district court erred in finding that Covenant lacked standing to challenge the City's failure to timely process the initial sign application. *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 428-29 (4th Cir. 2007). (12a-14a). However, the

Fourth Circuit affirmed the lower court's award of summary judgment on other grounds, finding that because the sign code enforced against Covenant was content-neutral it did not need to impose any time limits whatsoever. *Id.* at 431-35 (17a-28a). Further, the court excused the City's failure to process the sign application as merely negligent and not a constitutional violation. *Id.* at 435-37. (28a-32a).

## II. FACTUAL BACKGROUND OF THE CASE

The Sign Regulations enforced by North Charleston at the time Covenant submitted its application controlled the permitting, content, number, size, height, and design of signs, and other visual displays, such as flags and banners. (5a, 39a). To post a sign, a person or organization had to first receive permission from the City. (5a, 39a).

Under that scheme, the City was never required to pass judgment on a sign application. (7a). Indeed, the court of appeals acknowledged that the permitting scheme enforced against Covenant did not require the City to process an application within any specific time period. *Id.* Even though Covenant submitted an application on December 1, 2004 the City had still not responded to this application by the time Covenant filed its Complaint on May 12, 2005. (5a). Five months later, after the City had enacted a new sign code, the City finally denied Covenant's initial application. (41a).

## III. PROCEEDINGS BELOW

As a result of the City's failure to process the initial sign application, Covenant filed suit

challenging the constitutionality of North Charleston's Sign Regulations. (5a). After Covenant moved for injunctive relief, the City adopted new sign restrictions. (9a). In light of the new ordinance, the district court found Covenant's request for injunctive relief moot. *Id.* However, the court held that Covenant's claims for damages were not rendered moot as a result of the new ordinance. *Id.*

On summary judgment, the district court found that Covenant lacked standing to assert a damage claim because it concluded that Covenant's sign application would have been denied despite unconstitutional provisions contained in the original Sign Regulations. (9a-11a, 50a). The court failed to consider Covenant's standing to challenge the 300-day delay in processing the first sign application and the code's total lack of procedural safeguards. (13a, 43a-46a). The court also held that Covenant's subsequent applications were properly denied based on the pending ordinance doctrine. (10a, 55a).

On appeal, the Fouth Circuit found that the district court erred in finding that Covenant lacked standing to challenge the City's failure to timely process the initial sign application. (12a-14a). The court reasoned that Covenant's injury of not having its application processed in a timely fashion was distinct from the injury of the denial of the application. (13a). While the Fourth Circuit found that the lower court erred as to standing, the court affirmed on the basis that no time limits were required because the Sign Regulations were content-neutral. *Id.* at 431-35 (17a-28a). Further, the court excused the City's failure to process Covenant's sign application as merely negligent and not a First Amendment violation. *Id.* at 435-37. (28a-32a).

## REASONS FOR GRANTING THE PETITION

The *North Charleston* decision has further widened the split among the circuit courts with regard to whether any procedural safeguards are required in a content-neutral speech permitting scheme. The Fourth Circuit's conclusion that permits for speech activity can be held indefinitely so long as the regulation is not based on content is in conflict with decisions from the Second, Third, Fifth, and Seventh Circuits. Given the fact that the First, Ninth, and Eleventh Circuits have previously accepted the position now adopted by the Fourth – that content-neutral licensing schemes need not contain any procedural safeguards – the split among the circuits continues to widen. Such divergence of opinion as to this important issue should be rectified.

Inaction will encourage courts to uphold licensing schemes that are completely devoid of any safeguards. This will allow government officials to indefinitely delay the processing of applications for speech activity such as parades, demonstrations, festivals, door-to-door solicitation, and signs without consequence, so long as the regulation in question is found to be content-neutral. Such a "pocket veto" of time-sensitive speech activity is inconsistent with this Court's prior restraint jurisprudence.

Moreover, the granting of this petition will allow the Court to clarify whether the decision in *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S. Ct. 775 (2002), was actually intended to overturn *FW/PBS, Inc. v. Dallas*, 493 U.S. 215. 110 S. Ct. 596 (1990), and *Riley v. National Federation of the Blind*, 487 U.S. 781, 108 S. Ct. 2667 (1988), which held that even content-neutral prior restraint schemes must contain procedural safeguards.

## I. THE FOURTH CIRCUIT'S DECISION IN *NORTH CHARLESTON* EPITOMIZES THE CONFUSION RESULTING FROM THIS COURT'S DECISION IN *THOMAS*.

The Fourth Circuit in *North Charleston* held that the Sign Regulations' lack of any time limits for rendering a decision on sign applications was not unconstitutional because the Regulations were content-neutral. 493 F.3d at 431-37 (21a-28a). In reaching this determination, the panel held that *Thomas* dictated that time limits were not necessary. 493 F.3d at 431-32 (18a-21a). Such a conclusion, however, is based on a misreading of *Thomas*.

The jurisprudence of procedural safeguards began in earnest in 1965 with *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734 (1965). This Court held that a state law that prevented films from being shown until a censorship board had given its approval was unconstitutional. 380 U.S. at 59, 85 S. Ct. at 739. The Court established the minimum procedural requirements that must be included whenever speech activity is subject to government approval. *Id.* The three necessary safeguards are:

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof . . . .

*FW/PBS, Inc.*, 493 U.S. at 227, 110 S. Ct. at 606. From 1965 to 1988, this Court invalidated at least ten laws or procedures that limited speech activity without integrating the *Freedman* safeguards. *E.g.*, *Dombrowski v. Pfister*, 380 U.S. 479, 489, 85 S. Ct. 1116, 1122 (1965) (invalidating state "Subversive Activities" law in part because it failed *Freedman* test); *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141-42, 88 S. Ct. 754, 755-56 (1968) (invalidating censorship ordinance for failure to provide adequate safeguards); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 181-82, 89 S. Ct. 347, 351-52 (1968) (holding that restraining order against rally by racist group was invalid because did not comply with *Freedman*); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 155 n.4, 89 S. Ct. 935, 941 (1969) (recognizing that parade permit scheme would need to comply with *Freedman*); *Blount v. Rizzi*, 400 U.S. 410, 417-19, 91 S. Ct. 423, 428-30 (1971) (invalidating postal rules restricting obscene materials because rules lacked safeguards); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 372-75, 91 S. Ct. 1400, 1406-08 (1971) (imposing time limits on federal statute that allowed seizure of obscene materials); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559-62, 95 S. Ct. 1239, 1246-48 (1975) (finding unconstitutional city facility rental policy absent *Freedman* procedures); *McKinney v. Alabama*, 424 U.S. 669, 676, 96 S. Ct. 1189, 1194 (1976) (overturning obscenity conviction in part because no safeguards in place); *National Socialist Party of Am. v. Skokie*, 432 U.S. 43, 44, 97 S. Ct. 2205, 2206 (1977) (staying court-ordered injunction where appellate review not expedited); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317, 100 S.

Ct. 1156, 1162 (1980) (public nuisance statute could not be applied to film exhibition); *M.I.C. Ltd. v. Bedford Township*, 463 U.S. 1341, 1343, 104 S. Ct. 17, 18-19 (1983) (granting stay of injunction where state courts did not ensure prompt resolution).

Although several of these decisions dealt with pieces of legislation that were content-neutral, this Court had never specifically analyzed what measures were appropriate for content-neutral time, place, and manner restrictions until 1988. In *Riley v. National Federation of the Blind*, 487 U.S. 781, 802, 108 S. Ct. 2667, 2680-81 (1988), the Court held that even a content-neutral "time, place, and manner restriction . . . must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.'" 487 U.S. at 802, 108 S. Ct. at 1680 (quoting *Freedman*, 380 U.S. at 59, 85 S. Ct. at 739). The Court reviewed license requirements for professional fundraisers and found that, although the regulations were not at all based upon content, time limits had to be in place to ensure prompt action. *Id.*

The third *Freedman* requirement – that the government proceed to court to vindicate the denial of any speech permit – is particularly onerous and is less important where the speech applicant has the financial incentive to appeal permit denials. In light of these practical issues, in 1990 this Court established a second tier of restrictions that needed only to include the first two *Freedman* safeguards.

> The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the

> unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied.

*FW/PBS*, 493 U.S. at 228, 110 S. Ct. at 606. In *FW/PBS*, this Court held that where permit schemes did "not present the grave 'dangers of a censorship system,' we conclude that the full procedural protections set forth in *Freedman* are not required." *Id.* (citations omitted). The Court emphasized that Dallas' content-neutral permitting mechanism was markedly different from Maryland's censorship board because the city did not review content, but rather reviewed the general qualifications of each application. 493 U.S. at 229, 110 S. Ct. at 606-07. Based on these differences, Justice O'Connor wrote:

> that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court. *Limitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the "principle that the freedoms of expression must be ringed about with adequate bulwarks."*

493 U.S. at 230, 110 S. Ct. at 607 (emphasis added). Three justices – Brennan, Marshall, and Blackmun – concurred in the judgment but vociferously objected to Justice O'Connor's opinion in as much as it removed the third *Freedman* safeguard for content-neutral licensing schemes. 493 U.S. at 238-42, 110 S. Ct. at 611-13. The concurring justices argued that the matter had been settled by the *Riley* decision:

> Two Terms ago, in *Riley*, this Court applied *Freedman* to a professional licensing scheme because the professionals involved, charity fundraisers, were engaged in First Amendment-protected activity. We held that, even if North Carolina's interest in licensing fundraisers was sufficient to justify such a regulation, it "must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.'" The North Carolina statute did not so provide, and we struck it down. In *Riley*, this Court, to be sure, discussed the failure of the North Carolina statute to set a time limit for actions on license applications, but it also held that the *licensor* must be required to go to court, not the would-be fundraiser.

493 U.S. at 240, 110 S. Ct. at 612. Although the *FW/PBS* decision left some doubt as to the status of *Freedman*'s third safeguard, there could be no doubt that, whenever speech activity is subject to a permit, the first two safeguards must be in place. In other words, whether a regulation is content-based or is

merely a time, place, and manner restriction, it must require government officials to grant or deny the application within a specific, brief time frame and provide for expeditious appeal.

This Court's subsequent decision in *Thomas* did not overturn any previous decisions. Indeed, the Court went to great pains to show that the decision was in keeping with prior precedent. 534 U.S. at 321-22, 122 S. Ct. at 779. The *Thomas* Court reviewed the Chicago Park District regulation whereby applicants requested to use park facilities for large groups, such as a family reunion, a soccer game, or a political rally. As the Court repeatedly pointed out in the opinion, their analysis was very much dependent on several factors. First, the regulation only applied to speech in a public forum. *E.g.*, 534 U.S. at 317, 122 S. Ct. at 777 ("municipal park ordinance"); 534 U.S. at 322, 122 S. Ct. at 779-80 ("scheme at issue here is . . . content-neutral time, place, and manner regulation of the use of a public forum"); *id.* ("a content-neutral permit scheme regulating speech in a public forum"); *id.* (describing standard for "use of a public forum"). Second, the regulation applied primarily to numerous non-speech-related activities. *Id.* ("the ordinance (unlike the classic censorship scheme) is not even directed to communicative activity as such, but rather to *all* activity conducted in a public park"); *id.* ("[t]he picknicker and the soccer player, no less than the political activist or parade marshal, must apply"). Nevertheless, the Court still held that safeguards must be provided to guard against abuses of official discretion in awarding permits. 534 U.S. at 323, 122 S. Ct. at 780. The Court stated:

> Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression . . . . We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to review.

*Id.* This is consistent with the *Riley* and *FW/PBS* decisions. This Court next reviewed with approval the procedural safeguards put in place by the Park District. 534 U.S. at 324, 122 S. Ct. at 780. First, "the Park District must process applications within 28 days." *Id.*; *also* 534 U.S. at 318, 122 S. Ct. at 777 ("the Park District must decide whether to grant or deny the application within 14 days unless, by written notice to the applicant, it extends the period an additional 14 days"). Next, there was an "appeal to the General Superintendent" who "must act on the appeal within seven days." 534 U.S. at 319, 324, 122 S. Ct. at 777, 781. Finally, the applicant could appeal a denial by writ of certiorari to state court. *Id.* Based on the fact that the regulation in *Thomas* contained these safeguards, the *Freedman* and *FW/PBS* procedural requirements were satisfied. 534 U.S. at 325, 122 S. Ct. at 781. At no point did the Court say that no procedural safeguards were required in content-neutral regulations. *Id.*

Moreover, subsequent to *Thomas*, this Court has affirmed that municipal zoning ordinances that condition the exercise of protected First Amendment activities on the approval of government officials must at least include: (1) specific time limits on the initial decision-making processes, and (2) provisions

for "'prompt judicial determination' of the applicant's legal claim." *City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 779-81, 124 S. Ct. 2219, 2223-24 (2004). *Littleton* reaffirmed these requirements:

> The core policy underlying *Freedman* is that the license for a *First Amendment-protected business* must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two [*Freedman*] safeguards are essential . . .

541 U.S. at 780, 124 S. Ct. at 2224 (quoting *FW/PBS*, 493 U.S. at 228) (emphasis added).

Given the steps taken by this Court in *Thomas* to adhere to prior precedent involving procedural safeguards in licensing schemes, and in light of *Littleton*, the Fourth Circuit's conclusion that *Thomas* eliminated the need for procedural safeguards in content-neutral speech regulations should be addressed. Otherwise, municipalities will be free to subject other applicants wishing to engage in protected speech to indefinite delays just as the City of North Charleston did in this case.

## II. THE FOURTH CIRCUIT'S DECISION IN *NORTH CHARLESTON* WIDENS THE SPLIT AMONG CIRCUIT COURTS AS TO WHETHER PRIOR RESTRAINTS ARE REQUIRED TO CONTAIN PROCEDURAL SAFEGUARDS.

The conclusion reached by the Fourth Circuit in *North Charleston* – that content-neutral prior

restraints are not required to contain procedural safeguards – has also been adopted by three other circuits. *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1082 (9th Cir. 2006); *Granite State Outdoor Adver., Inc. v. City of St. Petersburg*, 348 F.3d 1278, 1281-83 (11th Cir. 2003); *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 21 (1st Cir. 2002). In *Granite State*, for instance, the Eleventh Circuit considered whether, post-*Thomas*, a prior restraint on speech was required to contain specific time limits by which an application must be approved or denied. 348 F.3d at 1280-81. After discussing this Court's holdings in *Freedman* and *Thomas*, the Eleventh Circuit concluded that whether a prior restraint required specific time limits depended upon whether it was content-based or content-neutral. *Id.* at 1281. After finding the ordinance at issue to be content-neutral, the Eleventh Circuit concluded that *Thomas* dictated that time limits were not required. *Id.* at 1282-83.

The Ninth Circuit in *G.K. Ltd.* recently issued a similar holding. 436 F.3d at 1082. There, the Ninth Circuit addressed the constitutionality of a sign ordinance that was being challenged by a local business on the grounds that it was an unconstitutional regulation of commercial speech and was unconstitutionally vague. *Id.* at 1068. The plaintiff contended that the ordinance constituted an invalid prior restraint on speech. *Id.* at 1081. In response to the argument that the ordinance failed to contain the necessary procedural safeguards, such as a process for a swift appeal, the Ninth Circuit concluded that because the ordinance was content-neutral, *Thomas* dictated that such procedural safeguards were not necessary. *Id.* at 1082.

Ultimately, the Ninth Circuit found that because "the Sign Code is content neutral, the procedural requirements of the prior restraint doctrine need not be satisfied." *Id.* (citing *Southern Ore. Barter Fair v. Jackson County*, 372 F.3d 1128, 1138 (9th Cir. 2004)); *but see Tollis, Inc. v. County of San Diego*, --- F.3d ---, 2007 WL 2937012 (9th Cir. Oct. 10, 2007) ("A licensing requirement for protected expression is patently unconstitutional if it imposes no time limits on the licensing body").

While the First, Fourth, Ninth, and Eleventh Circuits have interpreted *Thomas* to eviscerate the procedural safeguard requirements for content-neutral prior restraints, several circuit courts of appeal have held that *Thomas* did not end the requirement that procedural safeguards be in place for content-neutral permitting schemes. *E.g.*, *Lusk v. Village of Cold Spring*, 475 F.3d 480, 492-93 (2d Cir. 2007); *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 296 n.12 (5th Cir. 2002); *Southworth v. Board of Regents*, 307 F.3d 566, 589 (7th Cir. 2002); *also Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150, 1163 (10th Cir. 2006) (acknowledging that "a licensing scheme with no limit on the time to decide matters affecting the license 'risk[s] . . . indefinitely suppressing speech,'" but declining to reach merits because ordinance in question allowed conditional operation).

The Fifth Circuit in *Encore Videos* found that *Thomas* was limited to a public forum analysis:

> The relevance of *FW/PBS* is not affected by *Thomas* which held that the procedural requirements of *Freedman* . . . do not apply to "a licensing scheme . . .

> [that] is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum." *The present case does not concern "regulation of the use of a public forum."*

330 F.3d at 296 n.12 (emphasis added) (citations omitted). The court stated, "*Thomas* did not overrule *FW/PBS* or even hint that its scope has been narrowed." *Id.*; *see also Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1028 n.9 (C.D. Cal. 2002) (finding that "*Thomas* Court addressed a content-neutral permit scheme regulating speech in a public forum" and "*Thomas* is more limited than Defendant suggests").

Likewise, in *Southworth*, the Seventh Circuit – the circuit from which *Thomas* itself arose – acknowledged that the finding in *Thomas* was based on the presence of procedural safeguards:

> In upholding the Chicago ordinance, the Court also *relied on the fact that the ordinance included a deadline for processing applications, required the city to explain the reasons for any denial, and provided for an appeal of the decision to the General Superintendent of the Park District.*

*Id.* at 589 (emphasis added). More recently in *Lusk*, the Second Circuit rejected a municipality's attempt to extend *Thomas* to a sign ordinance that required a permit in advance of posting signs outside of one's home. 475 F.3d at 487. In order to post a sign in the village, an applicant was required to first obtain a

permit or certificate of appropriateness, a process that could take up to 75 days. *Id.* at 491-92. The Second Circuit found that

> Where, as here, a property owner wishes to take a public position on a pressing public issue, for example, or on the qualifications of a candidate for public office in an imminent election, the time required to obtain approval may prevent the property owner from doing so until after the public issue is settled or the election is over. Such belated approval is of little consolation to Lusk and those like him in this regard, and of little use to their neighbors or the political process . . . . In the end, the approval process itself renders the regulatory scheme invalid.

*Id.* at 492. In reaching this conclusion, the court explicitly rejected the argument that *Thomas* absolved the ordinance from having brief, specific time limits because it was content-neutral. *Id.* at 492 n.14. Ultimately, the Second Circuit concluded *FW/PBS* controlled based on its holding that "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *Id* (citing *FW/PBS*, 493 U.S. at 226).

The Third Circuit's decision in *Riel v. City of Bradford*, 485 F.3d 736, 756-57 (3d Cir. 2007), recognized this principle as well. Despite finding the sign ordinance at issue content-neutral, when faced with the question of whether the ordinance required sufficiently prompt decisions on applications, the Third Circuit noted, "'[a] scheme that fails to set

reasonable time limits on the decision maker creates the risk of indefinitely suppressing permissible speech.'" *Id.* at 756 (citing *FW/PBS*, 493 U.S. at 227). The court found that the ordinance passed constitutional muster because it specifically required a permitting decision within 30 days. *Id.* It is clear from the Third Circuit's analysis, however, that it found *FW/PBS* controlling rather than concluding that *Thomas* freed the ordinance from containing any safeguards because it was content-neutral.

The contrast between the analysis advocated by the First, Fourth, Ninth, and Eleventh Circuits and the approach adopted by the Second, Third, Fifth, and Seventh could not be more clear. For example, had Covenant's claim been before the Third Circuit, under *Riel* the fact that the North Charleston Sign Regulations contained absolutely no time limits would have resulted in a finding that the ordinance was an invalid prior restraint. Instead, the Fourth Circuit upheld the Regulations because *Thomas* purportedly freed content-neutral licensing schemes from the need to impose *any* safeguards. This disparate treatment is not speculative but has actually occurred in dozens of instances since 2002. Thus, certiorari should be granted to bring uniformity to the circuits on this critical issue.

## CONCLUSION

The Fourth Circuit's conclusion that because the North Charleston Sign Regulations were content-neutral they did not need to impose any time limits on the processing of applications was based on an erroneous interpretation of *Thomas*. Given this Court's many precedents establishing procedural

requirements and the overt factual distinctions between the code at issue in *Thomas* – which contained specific time limits – and the one enforced by North Charleston – which lacked any time limits whatsoever – the Fourth Circuit should be reversed.

The Fourth Circuit is not alone in its interpretation of *Thomas*. Decisions from the First, Ninth, and Eleventh Circuits have also held that content-neutral regulations need not contain any procedural safeguards. These holdings are in stark contrast to case law from the Second, Third, Fifth, and Seventh Circuits, which have refused to apply *Thomas* in this fashion, opting instead to continue to apply *FW/PBS* to content-neutral licensing schemes.

By interpreting *Thomas* to eliminate the requirement that governments have procedural safeguards to ensure prompt decision-making within content-neutral speech restrictions, four circuits have given city and county officials free reign to impose a "pocket veto" on any speech they disfavor. It is not difficult to illustrate how this violates the plain intent of *Freedman* and its progeny. For example, it is commonplace to require a permit before parades, demonstrations, and door-to-door canvassing or soliciting. Many such regulations do not inquire about content. Allowing officials to simply hold such applications indefinitely, and thereby delay speech, ignores the rationale for procedural safeguards. Time-sensitive speech truly is lost once an application is held for more than a brief time. *Thomas* did not alter this analysis. It was not a radical or controversial decision, indeed it was a unanimous decision. Thus, the Court should take this opportunity to put an end to the perversion of *Thomas* by an increasing number of federal courts.

DATED this 1st day of November, 2007.

Respectfully submitted,

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# APPENDIX

United States Court of Appeals
Fourth Circuit

COVENANT MEDIA OF SOUTH CAROLINA, LLC,
Plaintiff-Appellant,
v.
The CITY OF NORTH CHARLESTON,
Defendant-Appellee.
Scenic America, Amicus Supporting Appellee.

No. 06-1894.

Argued: March 12, 2007.
Decided: July 6, 2007.

**ARGUED:** Edward Adam Webb, The Webb Law Group, L.L.C., Atlanta, Georgia, for Appellant. Derk B.K. Van Raalte, IV, Brady Hair Law Offices, North Charleston, South Carolina, for Appellee.
**ON BRIEF:** Randal R. Morrison, Sabine & Morrison, San Diego, California; Stephanie P. McDonald, Senn, McDonald & Leinbach, L.L.C., Charleston, South Carolina; J. Brady Hair, Brady Hair Law Offices, North Charleston, South Carolina, for Appellee. William D. Brinton, Rogers Towers, P.A., Jacksonville, Florida, for Amicus Supporting Appellee.

Before WILLIAMS, Chief Judge, and TRAXLER and SHEDD, Circuit Judges.

Chief Judge WILLIAMS wrote the opinion, in which Judge TRAXLER and Judge SHEDD joined.

WILLIAMS, Chief Judge:

Covenant Media of South Carolina, LLC ("Covenant"), a company in the business of erecting and operating billboards, appeals the district court's grant of summary judgment to the City of North Charleston ("North Charleston" or "City"), South Carolina on Covenant's claim under 42 U.S.C.A. § 1983 (West 2003) that North Charleston violated Covenant's First Amendment rights through its sign regulations. For the following reasons, we affirm.

I.

Although billboards are important communication tools that convey political, social, and, most commonly, commercial messages, they create unique issues apart from their communicative function because they are "large, immobile, and permanent structures." *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 502, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). (internal quotation marks omitted). Billboards convey messages, but they do so through imposing structures dotting the landscape. These structures "create[ ] a unique set of problems for land-use planning and development." *Id.*

Because of their large, inescapable visual presence, billboards have been the target of national and state regulation. For example, in the Highway Beautification Act of 1965, 72 Stat. 1028, Congress declared "that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public

travel, and to preserve natural beauty." 79 Stat. 1028, § 131(a).

South Carolina responded to the concerns caused by billboards by enacting the Highway Advertising Control Act (HACA), S.C. Code Ann. § 57-25-110 *et seq.* (West 2006). HACA, however, does not purport to provide exclusive regulation for billboards, and it contemplates that municipalities may enact stricter regulations of billboards. *See* S.C. Code Ann. § 57-25-220. This case concerns North Charleston's efforts, through its general sign regulations, to regulate billboards within its city limits and the effect those regulations had on Covenant.

The relevant facts are detailed later, but a brief preview now will help set the stage. In December 2004, Covenant submitted an application to construct a billboard in North Charleston. At the time, the City had in effect a zoning regulation (the "Sign Regulation") governing billboards as well as other signs. When months later the City had not provided Covenant a decision on the application, Covenant filed this lawsuit challenging the constitutionality of the Sign Regulation. Four months later, the City published its intention to amend the Sign Regulation.[1] Two days after that published notice, Covenant filed twenty-five additional applications. In the end, none of Covenant's applications were approved.

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[1] Throughout this opinion, we use the term "Sign Regulation" to refer to the regulation in effect from before the time this case was commenced until October 13, 2005, when the City enacted amendments. "Revised Sign Regulation" refers to the amended sign regulation.

## A. The Sign Regulation

Until October 13, 2005, North Charleston had in effect a Sign Regulation governing placement of billboards and other signs within the city limits. The Sign Regulation distinguished between off-premises signs and on-premises signs. Off-premises signs were defined as signs "identifying or advertising a business, person, or activity, or goods, products, services or facilities not located on the premises where the sign is installed or directing persons to a different location from where the sign is installed." Sign Regulation, § 8-2(g). On-premises signs were defined as signs "identifying or advertising a business, person, or activity, or goods, products, services or facilities located on the premises where the sign is installed." Sign Regulation, § 8-2(h).

Under the Sign Regulation, "all off-premises signs [were] considered to be billboards." The regulation required that a permit be issued before a billboard could be constructed, and billboards were required to comply with certain requirements. Sign Regulation, §§ 7-2, 8-6(c). For example, billboards could not "be located outside of an approved billboard plaza," which was defined as parts of certain main thoroughfares, and could not "be located in a neighborhood which is primarily residential in character." Sign Regulation, § 8-6(c). There were also size and spacing requirements: No billboard could "have an area of greater than seven hundred seventy-two (772) square feet," and no billboard could be "be located any closer than one thousand (1,000) feet from any existing billboard." *Id.*

Applications to construct billboards were required to be filed with North Charleston's zoning administrator. Important for this appeal, the Sign Regulation did not require the zoning administrator to act on an application within a specified period of time.

B. Covenant's First Application

On December 1, 2004, Covenant submitted an application to construct a billboard at 2161 Ashley Phosphate Road (the "December 2004 Application"). At the North Charleston City Hall, Covenant submitted the December 2004 Application to an authorized City official, who provided Covenant an initialed Receiving Record acknowledging receipt of the application.

By late spring 2005, Covenant had received no word from North Charleston concerning the December 2004 Application. Covenant did not call, write a letter, or otherwise inquire into the status of the application. Instead, Covenant responded to the City's inaction by filing a civil action against North Charleston under 42 U.S.C.A. § 1983 alleging that North Charleston violated Covenant's First Amendment rights through enforcement of its Sign Regulation.

C. The Revised Sign Regulation and Covenant's Subsequent Applications

In September 2005-after Covenant had filed this lawsuit-North Charleston began acting on long-intended revisions to the City's sign regulations. On

September 15, 2005, the City Council conducted the first reading of the Revised Sign Regulation that, among other things, capped the total number of billboards in the City at the current level and set a time limit for the City to act on a sign permit application. On September 28, 2005, the City published notice in Charleston's largest newspaper, *The Post and Courier,* that a public hearing would be held on October 13, 2005, during which the Revised Sign Regulation would be approved.

On September 30, two days *after* the published notice of the hearing for approval of revisions to the sign regulations, Covenant submitted twenty-five additional sign permit applications to the City of North Charleston (the "September 2005 Applications"). The September 2005 Applications were for permits to build billboards on several North Charleston streets, including multiple locations on Rivers Avenue and Ashley Phosphate Road.

On October 13, 2005, North Charleston's City Council enacted the Revised Sign Regulation. The City Council's stated purpose for the Revised Sign Regulation was to establish signage rules that "foster overall improvement to the aesthetic and visual appearance of the city, preserve and open up areas for beautification on property adjoining the public roadways, reduce visual clutter, enhance the City of North Charleston as an attractive place to live and work, reduce blighting influences, and improve

traffic safety by reducing driver distractions." (J.A. at 118-19.)[2]

To accomplish this purpose, the Revised Sign Regulation prohibits a net increase in new billboards. The only new billboards that it allows are those billboards that are constructed to replace existing billboards pursuant to a relocation agreement with the City. Revised Sign Regulation, § 8-6(e). For those billboards that can be built, the Revised Sign Regulation incorporates the former Sign Regulation's size and spacing requirements. Thus, as before, new billboards cannot be larger than 772 square feet and must be at least 1000 feet from an existing billboard. Revised Sign Regulation, § 8-9(b).

The Revised Sign Regulation also includes a 45-day time limitation for the City to act on sign permits, a procedural provision that was missing from the old ordinance. If the City fails to act within the 45-day period, the permit is deemed denied. Revised Sign Regulation, § 8-6(e).

From the time Covenant submitted its December 2004 Application through the adoption of the Revised Sign Regulation, Covenant owned no operating billboards, had no contracts with sign manufacturers or installers, and had no advertising contracts. After North Charleston adopted the Revised Sign Regulation, Covenant purchased another advertising

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[2] Citations to "(J.A. at ----.)" refer to the contents of the Joint Appendix filed by the parties in this appeal.

company, Adams Outdoor, thereby acquiring over 300 billboard structures in South Carolina.

D. The City's Response

On October 14, 2005-the day after the City adopted the Revised Sign Regulation-North Charleston's zoning administrator notified Covenant by letter that its December 2004 Application could not be processed under the old Sign Regulation because the application failed to show property lines, dimensions, rights of way, and parking areas and because it did not include drawings and a certification from a registered South Carolina architect or engineer that the sign was safe and would withstand 100 mile-per-hour winds. All this information was required by the old Sign Regulation. *See* Sign Regulation, § 8-3(d). The City also warned Covenant that even if the application were complete it would likely be denied because the proposed sign "appears to be closer than 1000 to a previously established billboard." (J.A. at 144.)

Thereafter, the City's zoning administrator submitted an affidavit in this case stating that the December 2004 Application and September 2005 Applications were "incomplete and thus not capable of being formally processed" because they did not include information required by the Sign Regulation and Revised Sign Regulation. (J.A. at 207-210.) With regard to the merits of the applications, the zoning administrator stated that the December 2004 Application also failed to satisfy the old and revised sign regulations' requirement that new billboards be located at least 1000 feet from an existing billboard.

In fact, the billboard proposed in the December 2004 Application was no more than 726 feet from a preexisting billboard-a clear violation of the spacing requirement. The zoning administrator explained that the September 2005 Applications were unapprovable because the proposed signs were not replacement signs, as required by the Revised Sign Regulation.

E. District Court Decision

Covenant filed a motion for partial summary judgment on its § 1983 claim, seeking a court order allowing it to construct the billboard requested in the December 2004 Application. North Charleston also filed a motion for summary judgment, seeking to have Covenant's case declared moot because the Revised Sign Regulation completely and permanently prohibits all new billboards. In addition, North Charleston asserted that the December 2004 Application could not be approved because it failed the Sign Regulation's requirement that a billboard be 1000 feet from an existing billboard.

In a decision on July 12, 2006, the district court concluded that Covenant's claims for injunctive relief, in which Covenant sought a court order enjoining the City from enforcing the old Sign Regulation, were moot in light of North Charleston's adoption of the Revised Sign Regulation. But the district court concluded that Covenant's claim for monetary damages did not become moot as a result of the City's replacement of the Sign Regulation with the Revised Sign Regulation.

North Charleston did not contest Covenant's allegation that the old Sign Regulation was unconstitutional, and the district court concluded that North Charleston's Sign Regulation "purported to regulate the posting of signs based on their content" because the City treated off-premises signs (billboards) differently than on-premises signs. (J.A. at 342.) The district court observed, however, that the December 2004 Application proposed a sign closer than 1000 feet to a preexisting billboard, thereby failing the Sign Regulation's content-neutral spacing requirement. The court therefore determined that Covenant did not have standing to challenge the Sign Regulation or to assert a claim of damages on the basis of its unsuccessful December 2004 Application "[b]ecause the application would have been denied even absent the unconstitutional provisions of the sign ordinance." (J.A. at 350.) In this respect, the district court reasoned that "if the applications were deficient under the prior ordinance's content-neutral requirements, then Covenant suffered no redressable injury by the City's denial of the applications and therefore lacks standing to challenge the unconstitutional provisions of the prior ordinance." (J.A. at 347.)

The district court further concluded that Covenant lacked standing to challenge the Sign Ordinance with respect to the denial of the September 2005 Applications because those applications are barred by the Revised Sign Regulation in accordance with South Carolina's pending ordinance doctrine.

Having determined that Covenant's claims for injunctive relief were moot and that Covenant lacked standing to assert claims for damages, the district court granted North Charleston's motion for summary judgment.

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Covenant timely appealed. We have jurisdiction pursuant to 28 U.S.C.A. § 1291 (West 2006).

II.

We review de novo the district court's grant of summary judgment to North Charleston on Covenant's § 1983 claim, and we construe the facts in the light most favorable to Covenant, the non-moving party. *See Laber v. Harvey,* 438 F.3d 404, 415 (4th Cir. 2006) (en banc). The district court's conclusion that Covenant lacked standing-and that the court therefore lacked Article III jurisdiction-is a legal conclusion that we review de novo. *White Tail Park, Inc. v. Stroube,* 413 F.3d 451, 459 (4th Cir. 2005). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' "*Laber,* 438 F.3d at 415 (quoting Fed.R.Civ.P. 56(c)).

A.

We begin, as we must, with standing and the district court's determination that Covenant lacked Article III standing to assert the unconstitutionality of the Sign Regulation. As the Supreme Court has

explained, "the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To have standing, a plaintiff must show (1) an "injury in fact," meaning an injury that is "concrete and particularized" and "actual or imminent;" (2) a "causal connection between the injury and the conduct complained of," meaning that the injury is "fairly traceable" to the defendant's actions; and (3) a likelihood that the injury "will be redressed by a favorable decision." *Id.* at 560-61, 112 S.Ct. 2130 (internal quotation marks omitted).

Covenant contends that the district court erred in determining that Covenant lacked standing because it "improperly concluded that Covenant's only injury was the ultimate denial of its initial application." (Appellant's Br. at 12.) In that respect, the district court "completely overlooked the injury suffered by Covenant as a result of the City's failure to process Covenant's initial sign application in a timely fashion." (Appellant's Br. at 12.) North Charleston counters by arguing that Covenant does not have standing to assert a claim for the untimely processing of its December 2004 Application because that application would have been denied-regardless of how long it took-for failing to comply with the Sign Regulation's spacing requirement. Thus, the City's argument goes, Covenant's "injury" of not receiving an approved application stems from the constitutional spacing requirement, not from the City's failure to process the application.

We agree with Covenant that the injury of not having an application processed timely is distinct from the injury of ultimate denial of that application. Covenant contends that the Sign Regulation, applied by the City, was unconstitutional on its face because it failed to require a decision on a sign permit within a specific time period, in contravention of procedural safeguards mandated in *Freedman v. Maryland,* 380 U.S. 51, 58-59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 226, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990).[3] If Covenant is right that the *Freedman* procedural safeguards were required in the Sign Regulation, it has suffered an injury by the City's application of an unconstitutional ordinance that is redressable at least by nominal damages. *See Carey v. Piphus,* 435 U.S. 247, 266, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). Moreover, just because a decisionmaker has a valid, constitutional basis for denying an application for a permit does not allow him to refuse to act on the application. The City cannot indefinitely delay consideration of an application simply because it knows that it has an ace in the hole-that the application would ultimately fail a valid requirement.

Whether *Freedman* in fact applies here is a matter that we must resolve on the merits, "[b]ut we must not confuse standing with the merits." *Utah Animal Rights Coalition v. Salt Lake City Corp.,* 371 F.3d 1248, 1256 (10th Cir. 2004) (concluding that an

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[3] The *Freedman* procedural safeguards, which are explained more fully later, require any permitting scheme that operates as a prior restraint on speech to set a time period for a decision on a permit application.

organization has standing to raise a First Amendment claim based on a permitting scheme's failure to comply with *Freedman* even if it is determined that on the merits *Freedman* does not apply). A plaintiff's standing to bring a case does not depend upon his ultimate success on the merits underlying his case. *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("[S]tanding in no way depends upon the merits of the plaintiff's contention that particular conduct is illegal...."). Rather, standing "depends ... on whether the plaintiff is the proper party to bring the suit." *White Tail Park*, 413 F.3d at 460 (internal quotation marks, alteration, and citation omitted). Otherwise, if a plaintiff's standing depended upon whether he succeeds on the merits, "then every unsuccessful plaintiff will have lacked standing in the first place." *Id.* at 461 (internal quotation marks omitted). Because Covenant alleges a personal injury-untimely consideration of its December 2004 Application-that was caused by North Charleston's application of the allegedly unconstitutional Sign Regulation and that is redressable by nominal damages, we conclude that the district court erred in determining that Covenant lacked standing.[4] *See Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984).

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[4] The constitution also requires that there be a live "case or controversy," i.e., a dispute that has not become moot. *See Am. Legion Post 7 v. City of Durham*, 239 F.3d 601, 605 (4th Cir. 2001). In some cases, the repeal of a statute or regulation renders moot a challenge to that law. *Id.* Here, however, we agree with the district court's determination that Covenant's suit was not rendered moot by the City's replacement of the Sign Regulation with the Revised Sign Regulation. In addition to injunctive relief, Covenant sought compensatory and nominal damages from the City's enforcement of the allegedly

B.

That Covenant has standing to challenge the timeliness of the City's decision on the December 2004 application does not provide it a passport to explore the constitutionality of every provision of the Sign Regulation.[5] Although there is broad "latitude given facial challenges in the First Amendment context," *Gonzales v. Carhart*, --- U.S. ----, 127 S.Ct. 1610, 1639, 167 L.Ed.2d 480 (2007), a plaintiff must establish that he has standing to challenge each

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unconstitutional former Sign Regulation. Covenant's suit is not moot because if Covenant is correct on the merits, it is entitled to at least nominal damages. *See Henson v. Honor Comm. of the Univ. of Va.*, 719 F.2d 69, 72 n. 5 (4th Cir. 1983) (noting that the dropping of disciplinary charges did not render a due process claim moot because the plaintiff was seeking nominal damages); *KH Outdoor, LLC v. Clay County, Fla.*, 482 F.3d 1299, 1303 (11th Cir. 2007) ("[B]ecause KH Outdoor requested damages, the changes made to the ordinance do not moot KH Outdoor's challenge to the Old Sign Ordinance."); *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006) (holding that a city's revisions of its sign ordinance did not moot a sign company's claim for damages because the company "might be entitled to nominal damages if it could show that it was subjected to unconstitutional procedures").

[5] The district court concluded that Covenant did not have standing to challenge the Sign Regulation under the First Amendment overbreadth doctrine, established in *Broadrick v. Oklahoma*, 413 U.S. 601, 611, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). *See Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 512 (4th Cir. 2002) ("The overbreadth doctrine constitutes 'a departure from the traditional rules of standing.' " (quoting *Broadrick*, 413 U.S. at 613, 93 S.Ct. 2908)). Covenant does not challenge this conclusion. (*See* Reply Br. at 1.)

provision of an ordinance by showing that he was injured by application of those provisions. *FW/PBS*, 493 U.S. at 230, 110 S.Ct. 596; *see CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1273 (11th Cir. 2006) ("We and our sister circuits have followed *FW/PBS* to require a plaintiff to establish injury in fact as to each provision [of an ordinance]."), and *id.*(collecting cases).

In this case, Covenant has standing only to challenge the constitutionality of the Sign Regulation insofar as it failed to require that decisions on applications be made within a specified period of time, in violation of *Freedman*. With respect to the ultimate denial of Covenant's December 2004 Application, the application was unapprovable because the proposed billboard was not at least 1000 feet from an existing billboard-a requirement not challenged by Covenant. Because Covenant's application violated the spacing requirement, it could not have been approved regardless of whether other substantive provisions of the Sign Regulation are held to be unconstitutional. Covenant, therefore, could not have suffered any substantive constitutional injury due to other provisions of the Sign Regulation that may have been unconstitutional. For this reason, Covenant does not have standing to challenge other substantive provisions of the Sign Regulation that could have served as the basis for denying the December 2004 Application. *See Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006) (holding that an outdoor advertising company could not establish redressability, and therefore standing, because "a favorable decision for Advantage even with respect to those sign code

provisions which were factors in the denial of its permit applications would not allow it to build its proposed signs, for these would still violate other unchallenged provisions of the sign code like the restrictions on size, height, location, and setback."). In sum, Covenant has standing to challenge the Sign Regulation's *process* for considering the December 2004 Application, but lacks standing to challenge the potential bases for the ultimate denial of that application.[6] *See CAMP,* 451 F.3d at 1273 (holding that an organization can challenge only those provisions of an ordinance that are related to its activities).

III.

Although we conclude that the district court erred in holding that Covenant lacked standing to challenge the constitutionality of the Sign Regulation, we may nonetheless affirm on alternative grounds the district court's grant of summary judgment to North Charleston. *Sec. & Exch. Comm'n v. Chenery Corp.,* 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943) ("[T]he decision of a lower court ... must be affirmed if the result is correct although the lower court relied

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[6] Since Hurricane Hugo ravaged the Charleston area in 1989, North Charleston has had in place, with brief interruptions, a moratorium on billboards. Covenant argues that this moratorium was unconstitutional. We do not reach this question because North Charleston has never claimed to have denied Covenant's applications or delayed consideration of them because of the moratorium. Instead, North Charleston claimed that the applications were properly denied by applying the regulations. Because the moratorium was never applied to Covenant's applications, Covenant has not been injured by the moratorium and therefore has no standing to challenge it.

upon a wrong ground or gave a wrong reason.... It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground ...." (internal quotation marks omitted)). We conclude that the district court reached the correct result, albeit for different reasons.

On the merits, Covenant argues that the Sign Regulation was an unconstitutional prior restraint on speech-both facially and as-applied-because it did not require the City to make a decision on the December 2004 Application within a specified period of time (a *Freedman* procedural safeguard), thereby allowing the City to delay a decision for over 300 days. We address these arguments in the following sequence. First, we explain that *Freedman* does not apply to all prior restraints, only those that are content-based. Second, we conclude that the Sign Regulation was content-neutral and that *Freedman*'s procedural safeguards were therefore not required. Finally, we conclude that the City did not apply the Sign Regulation in an unconstitutional manner.

A.

Covenant contends that the Sign Regulation was an unconstitutional prior restraint on speech because the Sign Regulation did not impose time limits on North Charleston's decision-making process. In *Freedman*, the Supreme Court set forth three procedural safeguards for a speech licensing scheme: "(1) any restraint prior to judicial review can be imposed only for a specified brief period during

which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *FW/PBS,* 493 U.S. at 227, 110 S.Ct. 596 (citing *Freedman,* 380 U.S. at 58-60, 85 S.Ct. 734).

"A prior restraint on speech that imposes no time limitations on the decision-making process plainly fails to satisfy the first requirement set forth in *Freedman.*" *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.,* 58 F.3d 988, 997 (4th Cir. 1995) (en banc) (citing *FW/PBS,* 493 U.S. at 229, 110 S.Ct. 596). This is because "[a] scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech." *FW/PBS,* 493 U.S. at 227, 110 S.Ct. 596.

Nevertheless, not all prior restraint permitting schemes must provide *Freedman*'s procedural safeguards. *See Thomas v. Chi. Park Dist.,* 534 U.S. 316, 322, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002). In *Thomas,* the Court counseled that the critical distinction for determining whether *Freedman*'s procedural requirements apply is whether the permitting scheme is content based. *Thomas* addressed Chicago's regulations governing rallies in city parks. Pursuant to the scheme, a group applied on several occasions for permits to hold rallies advocating the legalization of marijuana. *Id.* at 319-20, 122 S.Ct. 775. Some of the group's applications were granted and some were denied, and the groups sued the Chicago Park District alleging that the

permitting ordinance was unconstitutional on its face because it failed to meet *Freedman*'s procedural requirements. *Id.* at 320, 122 S.Ct. 775.

The Supreme Court rejected the facial challenge that the permitting scheme was unconstitutional for failing to include *Freedman*'s requirements. The Court explained that "*Freedman* is inapposite because the licensing scheme at issue ... is not subject matter censorship but content-neutral time, place, and manner regulation of the use of a public forum." *Id.* at 322, 122 S.Ct. 775. "A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* [i.e., diametrically] from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like." *Id.* at 322-23, 122 S.Ct. 775 (internal quotation marks omitted).

The Court distinguished the Chicago Park District's licensing scheme, which was a content-neutral permit scheme, from that in *FW/PBS*, which "involved a licensing scheme that 'target[ed] businesses purveying sexually explicit speech.' " *Id.* at 323 n. 2, 122 S.Ct. 775 (quoting *FW/PBS*, 493 U.S. at 224, 110 S.Ct. 596). Likewise, our decision in *11126 Baltimore Blvd.* dealt with an ordinance that "prohibit [ed] adult bookstores," defining such bookstores by the subject matter of the content they sold. 58 F.3d at 992 & n. 1.[7]

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[7] Relying on Supreme Court precedent, we stated in *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 58 F.3d 988 (4th Cir. 1995) (en banc), that "otherwise valid content-neutral time, place, and manner restrictions that require governmental permission prior to engaging in protected speech

Thus, to determine whether *Freedman* or *Thomas* governs resolution of this case, and accordingly whether the absence of time limits on decisionmaking rendered the Sign Regulation unconstitutional, we must determine whether the Sign Regulation was content based or content neutral. *See Thomas,* 534 U.S. at 322, 122 S.Ct. 775; *see also Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (stating that the constitutional scrutiny applied to a regulation depends upon whether it is content based or content neutral).

B.

As the district court observed, under the Sign Regulation "[a] billboard or other off-premises sign 'identifying or advertising a business, person, or activity, or goods, products, services or facilities not located on the premises where the sign is installed or directing persons to a different location from where the sign is installed' w[as] considered a 'sign requiring a permit.' " (J.A. at 341-42.) The Sign Regulation's distinguishment between off-premises and on-premises signs led the district court to conclude that North Charleston "purported to regulate the posting of signs based on their content." (J.A. at 342.)

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must be analyzed as prior restraints and are unconstitutional if they do not limit the discretion of the decisionmaker and provide for the *Freedman* procedural safeguards." *Id.* at 995. As explained in the text, this statement is no longer valid after *Thomas v. Chi. Park Dist.,* 534 U.S. 316, 322, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002).

We disagree with the district court's conclusion that the Sign Regulation's differing treatment of signs based on their location constitutes a content-based regulation of the signs. "The principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). As the Court explained, "[g]overnment regulation of expressive activity is content neutral so long as it is *justified* without reference to the content of the regulated speech." *Id.* (internal quotation marks omitted).

Expanding on *Ward*'s formulation for determining the content neutrality of a regulation, the Supreme Court has explained that a regulation is not a content-based regulation of speech if (1) the regulation "is not a 'regulation of speech,' " but rather "a regulation of the places where some speech may occur;" (2) the regulation "was not adopted 'because of disagreement with the message [the speech] conveys;' " or (3) the government's interests in the regulation "are unrelated to the content of the [affected] speech." *Hill v. Colorado,* 530 U.S. 703, 719-20, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000); *see Satellite Broad. and Commc'ns Assoc. v. FCC,* 275 F.3d 337, 353-54 (4th Cir. 2001) ("First, we must examine the plain terms of the regulation to see whether, on its face, the regulation confers benefits or imposes burdens based upon the content of the speech it regulates. If it does not, we then ask whether the regulation's manifest purpose is to

regulate speech because of the message it conveys."(internal citations and quotation marks omitted)).

Examined in light of these criteria, it is clear that North Charleston's Sign Ordinance was not a content-based regulation. North Charleston was not concerned with the message that a sign (such as a billboard) conveyed but instead with where particular signs were located. For example, the Sign Regulation confined billboards to particular "billboard plazas" within the city. The regulation did not, however, allow billboards displaying commercial messages while prohibiting those displaying noncommercial messages.[8] *Cf. Metromedia,* 453 U.S. at 512-13, 101 S.Ct. 2882 (plurality opinion) (holding unconstitutional a city ordinance that generally banned signs carrying non-commercial advertising). A city can regulate the location of a particular type of signs, as long as the type of signs are not distinguished by the messages they convey.[9] *Id.* at 512, 101 S.Ct. 2882. Similarly,

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[8] The Sign Regulation draws the location distinction as follows:
(g) Off-premises sign: This is a sign identifying or advertising a business, person, or activity, or goods, products, services or facilities not located on the premises where the sign is installed or directing a person to a different location from where the sign is installed.
(h) On-premises sign: This is a sign identifying or advertising a business, person, or activity, or goods, products services or facilities located on the premises where the sign is installed.
Sign Regulation, § 8-2.

[9] The sign regulation in this case differs in important respects from the ordinance that the Court declared unconstitutional in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 512-13, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). In *Metromedia,* San Diego's ordinance generally prohibited signs, but allowed on-

the Sign Ordinance was adopted to regulate land use, not to stymie any particular message. And North Charleston's interests in regulating signs were completely unrelated to the messages displayed: They were to "eliminate confusing, distracting and unsafe signs, assure the efficient transfer of

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site commercial signs and noncommercial signs falling within twelve categories. *Id.* at 494, 101 S.Ct. 2882.On-site signs were defined as signs "designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising *goods* manufactured or produced or *services* rendered on the premises upon which such signs are placed." *Id.* (emphases added) (internal quotation marks omitted). Thus, San Diego's ordinance distinguished between commercial advertising-signs advertising goods or services-and signs conveying noncommercial messages. By contrast, North Charleston's Sign Regulation's off-premises/on-premises distinction does not depend on whether the sign contains commercial or noncommercial advertising. *See Major Media of the Se., Inc. v. City of Raleigh,* 792 F.2d 1269, 1272 (4th Cir. 1986) (holding that a sign ordinance does not run afoul of the First Amendment if it does not treat commercial speech more favorably than noncommercial speech).

The twelve categories exempted from San Diego's prohibition included "government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and temporary political campaign signs." *Metromedia,* 453 U.S. at 494-95, 101 S.Ct. 2882 (internal quotation marks and alteration omitted). In this case, although North Charleston's Sign Regulation, like San Diego's, drew distinctions, e.g., for signs depicting time and temperature or commemorative signs, *see* Sign Regulation § 8-2(a) and (f), the Sign Regulation generally allowed all signs regardless of message, applying only time, place, and manner restrictions. *See* Sign Regulation, § 8-5.

information; and enhance the visual environment of the City of North Charleston." (J.A. at 57-58.) These legitimate interests in regulating signs existed wholly apart from any particular message conveyed by a sign.

To be sure, the Sign Regulation defined and distinguished between different types of signs. *See, e.g.,* Sign Regulation § 8-2 (defining various types of signs including "directional or instructional signs," "memorial signs," and "public signs"). And we recognize that distinguishing between different types of signs and where those signs may be located may also in effect distinguish where certain content may be displayed. But "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward,* 491 U.S. at 791, 109 S.Ct. 2746. The Sign Regulation did not regulate the location of different types of signs based on "the ideas or views expressed." *Turner,* 512 U.S. at 643, 114 S.Ct. 2445; *cf. Boos v. Barry,* 485 U.S. 312, 318-19, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (holding that an ordinance that prohibits, within 500 feet of embassies, signs "tending to bring a foreign government into ... disrepute" is content based); *Police Dep't of City of Chi. v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) (identifying as content based an ordinance that prohibited picketing except for "[p]eaceful picketing on the subject of a school's labor-management dispute").

To the extent that the Sign Regulation required looking generally at what type of message a sign

carries to determine where it can be located, this "kind of cursory examination" did not make the regulation content based. *Hill,* 530 U.S. at 721, 120 S.Ct. 2480 ("We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct."). For a regulation with a clear content-neutral purpose to be content based, there must be a more searching inquiry into the content. *See City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (concluding that a city ordinance banning newsracks except for those containing newspapers was content based because "whether any particular news-rack falls within the ban is determined by the content of the publication resting inside that news-rack" and the ordinance "limited (to zero) the number of newsracks *distributing commercial publications* "). The Sign Regulation was content neutral despite any content-differentiating effect. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment,* 25 Wm. & Mary L.Rev. 189, 218 (1983) ("[M]ost content-neutral restrictions have at least some de facto content-differential effects.").

*Turner* provides an analogous situation to the regulation at issue here. In *Turner,* the Court addressed the constitutionality of the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. 102-385, 106 Stat. 1460. 512 U.S. at 630, 114 S.Ct. 2445. The must-carry provisions required cable operators to carry, according to a statutory formula, a certain number of the broadcast signals of "local commercial

television stations" and "noncommercial education television stations." *Id.* at 631-32, 114 S.Ct. 2445. Although the cable operators challenged the must-carry provisions as being content based because they favored certain speakers, the Court rejected this argument, concluding that the must-carry provisions were not content based because the "overriding congressional purpose" for the provisions was "unrelated to the content of the expression disseminated by cable and broadcast speakers." *Id.* at 647, 114 S.Ct. 2445.

Likewise, North Charleston's Sign Regulation regulated the placement of signs unrelated to the messages on those signs. Instead, the City's purpose for the Sign Regulation was to address problems caused by signs wholly apart from any message conveyed. *See City of Ladue v. Gilleo,* 512 U.S. 43, 48, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) ("[S]igns take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation."). Thus, because North Charleston's Sign Regulation "d[id] not facially distinguish between ... messages based on content and because there is no evidence of a content-based purpose," we conclude that the City's Sign Regulation was a content-neutral regulation.[10] *See Am. Legion Post 7*

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[10] That North Charleston's Sign Regulation was content neutral does not mean that the regulation was constitutional. Content-neutral regulations can be unconstitutional because they burden more speech than is necessary to further the government's legitimate interest. *See Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 665, 114 S.Ct. 2445, 129 L.Ed.2d 497

*v. City of Durham*, 239 F.3d 601, 605 (4th Cir. 2001). Because the Sign Regulation was content neutral, it did not need time limitations on decisionmaking to be constitutional. *See Thomas*, 534 U.S. at 322, 122 S.Ct. 775. Accordingly, Covenant's facial challenge fails.

C.

Covenant also raises a challenge to the manner in which the City applied the Sign Regulation, contending that the City unconstitutionally "delay[ed] ... over 300 days in processing the [December 2004] [A]pplication." (Appellant's Br. at 26-27.) Although content-neutral time, place, and manner regulations need not incorporate the *Freedman* procedural requirements, a decisionmaker cannot use the absence of such requirements to stifle free expression. *Thomas*, 534 U.S. at 323, 122 S.Ct. 775 (noting that "even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression"); *see id.* at 325, 122 S.Ct. 775 ("Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this abuse must be dealt with if and

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(1994); *City of Ladue v. Gilleo*, 512 U.S. 43, 53, 58, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994).

In this case, North Charleston did not defend the constitutionality of the Sign Regulation, and the district court concluded that parts of the regulation "were overly-broad and gave the City impermissibly wide discretion to deny or grant billboard permits." (J.A. at 342.) We therefore leave undisturbed the district court's conclusion that the Sign Regulation-now since amended-was unconstitutionally overbroad.

when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements."). We must therefore determine whether North Charleston applied the absence of time limitations in its Sign Regulation in such a manner to stifle Covenant's First Amendment rights.

North Charleston does not dispute that it received Covenant's December 2004 Application. Instead, North Charleston asserts through a declaration from its city attorney that the December 2004 Application was "lost or misplaced." (J.A. at 203.) Prior to filing the lawsuit, Covenant never contacted the City to inquire about the status of its application. After Covenant filed this lawsuit, North Charleston requested a copy of the December 2004 Application, but Covenant did not provide the City with a copy of the application until September 21, 2005. Once the City received the copy, it acted on the application approximately three weeks later, notifying Covenant on October 14, 2005, that the application was unapprovable because it violated the 1000 foot spacing requirement.

Although Covenant offers several reasons why North Charleston failed to act on the December 2004 Application until three weeks after receiving the copy, Covenant has not properly refuted the City's sworn statement that it failed to act on the application due to mere negligent handling of the application. *See* Fed.R.Civ.P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse

party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."). Thus, in evaluating the grant of summary judgment to North Charleston on Covenant's First Amendment claim, we accept as a fact that the City's failure to act was negligent, not willful.

We turn now to the critical question in Covenant's as-applied challenge: Were Covenant's First Amendment rights violated by North Charleston's negligent handling of the December 2004 Application? We conclude that Covenant's rights were not violated.

Covenant brought this § 1983 action against North Charleston only; it did not sue any City official responsible for acting on the December 2004 Application. When a § 1983 claim is asserted against a municipality, two issues must be determined: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Collins v. City of Harker Heights*, 503 U.S. 115, 120, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Typically, determination of municipal liability under § 1983 centers on the second issue. *Id.*; *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (holding that a municipality is not liable under § 1983 "unless action pursuant to official municipal policy of some nature caused a constitutional tort"). In this case, however, addressing the second issue is unnecessary because

Covenant's harm was not caused by a constitutional violation.

"[I]n any given § 1983 suit, the plaintiff must ... prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim." *Daniels v. Williams,* 474 U.S. 327, 330, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). We have interpreted *Daniels* to mean that "allegations of a defendant's negligence do not state constitutional claims against such a defendant." *Gen. Elec. Co. v. United States,* 813 F.2d 1273, 1278 (4th Cir. 1987), *overruled on other grounds by Westfall v. Erwin,* 484 U.S. 292, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988), *superseded by statute,* Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub.L. No. 100-694, 102 Stat. 4563. We have also held that, in a § 1983 claim, negligence on the part of a government official is not enough to show a violation of certain First Amendment rights. *See Pink v. Lester,* 52 F.3d 73, 76 (4th Cir. 1995) (holding that negligent conduct in misrouting a form does not violate the First Amendment's right to petition); *Lovelace v. Lee,* 472 F.3d 174, 201 (4th Cir. 2006) (holding "that negligent acts by officials causing unintended denials of religious rights do not violate the Free Exercise Clause"). Thus, because negligent conduct is not enough to support a First Amendment claim against government officials, the absence of anything but negligence proves fatal to Covenant's as-applied challenge under § 1983.

If Covenant had called, written, or emailed the City to inquire about the status of the December 2004

Application and the City still refused to respond, such refusal may have established that the City intentionally refused to act on the application or was deliberately indifferent to the consequence of having a Sign Regulation that lacked procedural safeguards. Instead, Covenant is attempting to make a constitutional claim against the City for negligent handling of the December 2004 Application.

The City and its employees may have failed to take reasonable care in ensuring that Covenant's December 2004 Application was not lost, but such negligence does not amount to an intent to violate Covenant's First Amendment rights. To hold that negligent handling of the application amounts to a constitutional violation by the City would only trivialize the fundamental rights the First Amendment was meant to protect. We therefore conclude that Covenant's as-applied challenge to the Sign Regulation fails.

IV.

As noted previously, North Charleston did not defend at summary judgment the constitutionality in toto of the Sign Regulation, but the City also did not identify any particular parts of the Sign Regulation that it conceded were unconstitutional. Instead, the City asserted that because the 1000 foot separation requirement was fatal to Covenant's December 2004 Application, the remainder of the Sign Regulation was irrelevant. Similarly, although the district court concluded that parts of the Sign Regulation were "overly-broad" and gave "impermissibly wide discretion," (J.A. at 342), the court did not specify

which parts were unconstitutional, concluding instead that the December 2004 Application "would have been denied even absent the unconstitutional provisions of the sign ordinance." (J.A. at 350.)

Covenant contends that the district court erred in this approach because

> [r]ather than identifying the provisions of the Sign [Ordinance] that the City conceded were unconstitutional and then determining whether those parts were so connected as to establish that the City would not have passed the residue independently of that which is void, the District Court simply plucked the separation requirements out of the City's admittedly unconstitutional sign code and declared them severable from the remainder.

(Appellant's Br. at 24-25.) Covenant argues that because, in its view, the Sign Regulation was an unconstitutional prior restraint on speech because its permitting procedure did not have a time limitation for the City to process an application, the district court should have conducted a severance analysis to determine whether the unconstitutional provisions were severable from the remainder of the Sign Regulation. *See Knotts v. S.C. Dep't of Natural Res.*, 348 S.C. 1, 558 S.E.2d 511, 515 (2002) (concluding that the touchstone for severability under South Carolina law is whether the unconstitutional part of a statute is so intertwined and interdependent with the remainder of the statute to indicate that the legislature intended for the statute to remain as a whole).

We do not reach Covenant's severance argument for the simple reason that the Sign Regulation, which did not violate Covenant's First Amendment rights, was replaced by the Revised Sign Regulation prior to the district court's decision. Severance is a tool for preserving a current statute, *see United States v. Booker,* 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (severing the unconstitutional provision of the federal sentencing statute that made the Sentencing Guidelines mandatory in order to preserve the remainder of the federal sentencing scheme), and it flows from the principle that invalidating a whole statute may nullify more of the work of the people's elected representatives than is constitutionally necessary, *see Ayotte v. Planned Parenthood of Northern New England,* 546 U.S. 320, 126 S.Ct. 961, 967-68, 163 L.Ed.2d 812 (2006). But when, as here, the legislative body has repealed a law, there is nothing to preserve, and a severance analysis is inapplicable.

V.

The remaining question before us is whether the district court correctly determined that the September 2005 Applications were properly denied under South Carolina's pending ordinance doctrine. Under South Carolina's pending ordinance doctrine, a city may properly refuse a permit for a land use "when such use is repugnant to a pending and later enacted zoning ordinance." *Sherman v. Reavis,* 273 S.C. 542, 257 S.E.2d 735, 737 (1979); *see Scott v. Greenville County,* 716 F.2d 1409, 1418 (4th Cir. 1983) (looking to state law to determine whether an

applicant held a cognizable interest in a zoning permit). "An ordinance is legally pending when the governing body has resolved to consider a particular scheme of rezoning and has advertised to the public its intention to hold public hearings on the rezoning." *Id.*

North Charleston's Revised Sign Regulation was legally pending when Covenant submitted the September 30 Applications. Two weeks earlier, the North Charleston City Council held the first reading of the Revised Sign Regulation, as reflected in an September 16, 2005, article in *The Post and Courier,* entitled "N. Charleston OKs billboard limits." (J.A. at 340.) On September 28, 2005, two days before Covenant submitted its September 30 Applications, the City published notice in *The Post and Courier* that it would hold a public hearing on October 13, 2005, to approve the Revised Sign Regulation. Because the Revised Sign Regulation was, under South Carolina law, legally pending when Covenant submitted the September 30 Applications, it applied to those applications.[11] Those applications were prohibited under the Revised Sign Regulation

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[11] We are unpersuaded by Covenant's argument that the pending ordinance doctrine should not apply because North Charleston never informed Covenant about the potential revisions. Although Covenant contends that the City told Covenant on September 23 to submit the September 2005 Applications without informing it of the pending revisions to the Sign Regulation and that this constitutes unjust conduct, Covenant has not pointed to any authority that would entitle it to notice before the public-at-large. The notice published on September 28 was sufficient to inform Covenant of potential revisions to the Sign Regulation.

because they were for new billboards, not billboards replacing existing billboards.

Finally, Covenant contends that the district court should have applied South Carolina's "time of application" rule rather than the pending ordinance doctrine. In *Pure Oil Div. v. City of Columbia,* 254 S.C. 28, 173 S.E.2d 140 (1970), the South Carolina Supreme Court stated that where there is "good faith reliance by the owner on the right to use his property as permitted under the Zoning Ordinance in force at the time of the application for a permit," a subsequently enacted ordinance cannot deprive the owner of a use that was permitted under the then existing ordinance. *Id.* at 143. But for the time of application rule to apply, there must be good faith *reliance.* Covenant has not shown reliance on the old Sign Regulation. At the time Covenant submitted its September 2005 Applications, Covenant had no contracts for advertisements on the proposed billboards, no contracts with sign manufacturers, and no contracts with billboard installers. In fact, Covenant owned no operating billboards. Other than the hassle of preparing the ultimately unsuccessful applications,[12] the only actions Covenant took with respect to the September 2005 Applications that indicate any reliance were securing leases for the locations of the proposed billboards, but those leases did not require payments until there was an operating billboard. Covenant therefore has not demonstrated the type of reliance

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[12] The hassle of preparing applications is surely not enough to demonstrate reliance; otherwise, the pending ordinance doctrine would never apply because every applicant has gone through the hassle of preparing a permit application.

necessary to trigger the time-of-application rule. *Compare Sherman,* 257 S.E.2d at 737 (declining to apply the time-of-application rule because the permit applicant "ha [d] presented little, if any, proof of expenditures or incurrence of obligations in good faith reliance upon their proposed use"); *with Scott,* 716 F.2d at 1418 n. 10 (concluding that the time-of-application rule applied because the permit applicant had "substantial expenditures in preparation for obtaining the permit" and had informal approval from government officials). Because there is no indication that Covenant relied on the old Sign Regulation, we conclude that the time-of-application rule does not apply.

VI.

Contrary to the district court's decision, Covenant does have standing to challenge North Charleston's Sign Regulation, but Covenant's standing extends only to challenging the Sign Regulation's lack of time limitations on the City's decision to grant or deny an application. Nevertheless, because the Sign Regulation is content neutral, its failure to include time limitations does not render it unconstitutional. Neither did the City apply it unconstitutionally. Therefore, we affirm the district court's grant of summary judgment to North Charleston.

*AFFIRMED*

United States District Court
D. South Carolina, Charleston Division

COVENANT MEDIA OF SOUTH CAROLINA, L.L.C., Plaintiff,
v.
CITY OF NORTH CHARLESTON, SOUTH CAROLINA, Defendant.

No. CIVA 2:05-01394-PMD.

July 12, 2006.

Gene McCain Connell, Jr, Kelaher Connell and Connor, Surfside Beach, SC, Lead Attorney, Attorney to be Noticed, Edward Adam Webb, Webb Law Group, Atlanta, GA, Attorney to be Noticed, for Covenant Media of South Carolina LLC, Plaintiff.

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DUFFY, J.

This matter is before the court on Plaintiff Covenant Media of South Carolina, L.L.C.'s ("Covenant")

Motion for Partial Summary Judgment and Defendant City of North Charleston's ("City") Motion for Summary Judgment. The parties filed appropriate responses and replies to these motions. With the permission of the court, Covenant also filed a Surreply to the City's Reply Memorandum regarding the City's motion. After considering all pending motions and memorandum, the court grants Defendant City's motion for summary judgment and dismisses Plaintiff Covenant's motion for partial summary judgment.

The facts of this case, either uncontested or considered in the light most favorable to Covenant, are as follows:

Prior to October of 2005, the City had in force sign regulations which required that "[n]o ... sign requiring a permit ... shall be erected, added to or structurally altered ... until the required permits have been issued." Prior Code § 7-2. A billboard or other off-premises sign "identifying or advertising a business, person, or activity, or goods, products, services, or facilities not located on the premises where the sign is installed or directing persons to a different location from where the sign is installed" were considered a "sign requiring a permit." Prior Code §§ 8-2, 8-6. As such, the City purported to regulate the posting of signs based on their content. Sections of these regulations were overly-broad and gave the City impermissibly wide discretion to deny or grant billboard permits. The sign regulations also had several permissible content-neutral requirements for billboards. For example, the regulations required that billboards be at least 1,000

feet from the next nearest billboard, set back at least ten feet from all property lines adjacent to a public right of way, and no more than 772 square feet in size. Prior Code §§ 8-6(c)(3)-(6). In addition to the sign regulations, the City put in effect in 1999 a moratorium on the issuance of billboard permits. The City Council, by resolution, had extended this moratorium until June of 2006.

On December 1, 2004, Covenant submitted to the authorized City official an application for a permit to post a new off-premises billboard at 2161 Ashley Phosphate Road. Many months later, the City had failed to respond to Covenant's request. It is contested whether the City refused to process the application or the application was merely lost.

On May 12, 2005, Covenant filed this action alleging that the City's sign regulations and billboard moratorium were content-based prior restraints that prevented Covenant from engaging in protected speech activities in violation of the First Amendment. Covenant requested both injunctive relief and damages under section 1983.

On September 15, 2005, the City Council had the first reading of a proposed repeal of the *existing* sign ordinance and the adoption of a new sign law ("Amended Ordinance") providing for a content-neutral total ban of all new billboards. On September 16, 2005, the Post & Courier, the Charleston area's major newspaper, ran a story regarding the City's proposed change in its sign ordinance. On September 28, 2005, the City published notice in the Post & Courier of the public hearing to be held during which

the Amended Ordinance would be considered for adoption.

On September 30, 2005, Covenant submitted to the City twenty-five additional applications for billboard permits. These applications were marked as "received" by the City on October 3, 2005.

On October 13, 2005, the City Council approved by unanimous vote the ratification of the Amended Ordinance. Under the Amended Ordinance, which took effect immediately upon adoption, all new billboards are completely and permanently prohibited. On October 14, 2005, the City sent a letter to Covenant denying its original application, stating that the application was incomplete and noncomplying under both the prior and the current version of the ordinance. Since the adoption of the Amended Ordinance, the moratorium and the original sign regulations have not been in effect. Covenant does not allege that the Amended Ordinance is unconstitutional.

On April 20, 2006, the City moved for summary judgment as to all of Covenant's claims, and Covenant moved for partial summary judgment.

To grant a motion for summary judgment, the court must find that "there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). The judge is not to weigh the evidence but rather to determine if there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). All evidence should be viewed in the light most favorable to the non-moving party. *See Perini Corp. v. Perini Constr.*,

*Inc.*, 915 F.2d 121, 123-24 (4th Cir. 1990)."[W]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991).

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The "obligation of the nonmoving party is 'particularly strong when the nonmoving party bears the burden of proof." *Hughes v. Bedsole,* 48 F.3d 1376, 1381 (4th Cir. 1995) (quoting *Pachaly v. City of Lynchburg,* 897 F.2d 723, 725 (4th Cir. 1990)). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual bases." *Celotex,* 477 U.S. at 327.

The City argues for summary judgment, claiming that, as a matter of law, (1) all claims for relief are moot due to the adoption of the new ordinance and (2) Covenant has no standing to assert its claims because all of its applications were denied for constitutional reasons. Covenant denies both of these claims and also asserts that, even if it does fail to meet the traditional requirements for standing, (3) it has standing to facially challenge the prior sign regulations under the overbreadth doctrine. The court considers each of these arguments in turn:

(1) Mootness

The City argues that the passage of the Amended Ordinance has made all of Covenant's asserted claims moot. A case is moot where the cause of action is no longer live, or where the parties no longer hold a personal stake in the outcome. *Henschen v. City of Houston, Tex.*, 959 F.2d 584, 587 (5th Cir. 1992) (citing *Matter of Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1181 (5th Cir. 1986), *cert. denied*, 483 U.S. 1005, 107 S.Ct. 3228, 97 L.Ed.2d 734 (1987)). The court agrees that the adoption of the Amended Ordinance rendered moot Covenant's request for immediate injunctive relief; however, the claims for money damages did not become moot. If Covenant's rights were violated by the denial of their applications for billboard permits, and that denial caused actual damage, then Covenant has stated a live claim under § 1983. *Id.; see also Boulder Sign v. Boulder City NV*, 382 F.Supp.2d at 1190 (D. Nev. 2005) (finding that adoption of amended sign ordinance mooted all of plaintiff's claims for injunctive relief, but leaving open the damages issue). The court therefore dismisses as moot Covenant's claims for injunctive relief, and considers whether Covenant has standing to assert a claim for damages under § 1983.

(2) Standing to Assert Damages Claims

The Supreme Court has declared that "[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205 (1975). In its

constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. *Id.* The case-or-controversy requirement thus plays a critical role, and "Article III standing enforces the Constitution's case-or-controversy requirement." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 2308 (2004). The "core component" of the requirement that a litigant have standing to invoke the authority of a federal court "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 2136 (1992). The requisite elements of this "core component derived directly from the Constitution" are familiar: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324 (1984); *see also DaimlerChrysler Corp. v. Cuno,* 126 S.Ct. 1854, 1861, 2006 WL 1310731, * *7 (May 15, 2006).

Defendant City does not contest that its prior sign ordinance was unconstitutional. The City contends, however, that when the unconstitutional provisions are severed from the remainder of the code, Covenant's proposed signs still violated the prior ordinance's content-neutral, constitutional requirements. The City asserts that because Covenant's sign applications would have been denied under these requirements, Covenant fails the "traceability" and "redressability" standing doctrines, and has therefore suffered no compensable

constitutional injury. *See Boulder Sign Co., L.L.C. v. City of Boulder City, Nev.*, 2006 WL 1294390, *5 (D. Nev., 2006) (holding that the City's sign code still contained height, width, and sign face area restrictions which Boulder Sign's proposed signs exceeded; as such, because Boulder Sign could not have erected its proposed signs, the sign code's unconstitutional provisions caused no injury to Boulder Sign); *Valley Outdoor, Inc. v. County of Riverside,* 337 F.3d 1111, 1114-15 (9th Cir. 2003) ("no damages are warranted because the subject billboards were 'independently' illegal under the applicable ordinance's content-neutral zoning, size, and height provisions."); *see also Prime Media, Inc. v. City of Brentwood,* 398 F.3d 814, 824 (6th Cir. 2005) ("In view of Brentwood's permissible rejection of the application on size and height grounds, we agree that Prime Media's claim for actual or nominal damages is flawed as a matter of law."); *Harp Advertising Illinois, Inc. v. Village of Chicago Ridge,* 9 F.3d 1290, 1291 (7th Cir. 1993) (holding plaintiff lacked standing to allege constitutional injury where it proposed to build a sign that exceeded ordinance's constitutionally-enforceable restrictions on dimension); *Warth,* 422 U.S. 490, 95 S.Ct. 2197 (1975) (holding that plaintiffs challenging zoning practices of suburb that prevented construction of multifamily dwellings and low-income housing had no standing where they could not demonstrate that appropriate housing would be constructed without the exclusionary zoning ordinances). The court agrees that if the applications were deficient under the prior ordinance's content-neutral requirements, then Covenant suffered no redressable injury by the City's denial of the applications and therefore lacks

standing to challenge the unconstitutional provisions of the prior ordinance.

The City asserts the following constitutional, content-neutral reasons for denying Covenant's applications: (A) the single application filed December 1, 2005, would have been denied because it did not comport with the prior ordinance's separation requirements; and (B) the applications submitted on September 30, 2005 and received by the City on October 3, 2005, were submitted while the new ordinance was in the process of being passed and therefore were properly denied under the pending ordinance doctrine.[1]

(A) The application for 2161 Ashley Phosphate Road, filed December 1, 2004, violated the prior ordinance's separation requirements.

The City claims that the proposed billboard at 2161 Ashley Phosphate Road was in violation of the content-neutral requirement in effect at the time of application that new signs be at least 1,000 feet away from the nearest pre-existing sign.[2] In support of this allegation, the City submitted the affidavit of William Gore, the Zoning Administrator for the City. Mr. Gore attested that the proposed sign at 2161 Ashley Phosphate Road "appears likely to be

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[1] The City also asserts that all of the applications were incomplete and therefore could not be processed. Because the court decides this case on other grounds, it does not reach this argument.

[2] It is uncontested that an ordinance regulating the distances between billboards is a content-neutral, constitutional regulation.

impermissibly close to certain property lines" and "appears to be closer than 1,000' to a previously established billboard," both in violation of the sign ordinance in effect at the time of the application. (Dkt No. 72, Gore Declaration, ¶ 17.)

In Response to these allegations, Covenant submitted the affidavit of its president, Mr. Morgan Hudgens, who testified, "I am aware that the sign applied for was located in an otherwise approved 'billboard plaza' as defined by the City's regulation. I am also aware that the applied-for sign is more than 1000 feet from any other existing "billboard," did not exceed 772 square feet of display area, and otherwise complied with all lawful restrictions imposed by the existing sign regulations at the time Mr. Power submitted the completed sign application package to the City," (Dkt No. 14, Hudgens Declaration, ¶ 13.) Covenant argues that Mr. Gore's declaration that the sign "appears likely" to be too close to property lines and "appears" to be closer than 1,000 feet to another billboard is "simply insufficient" to support a motion for summary judgment.

In its Reply to Covenant's Response, the City submitted new evidence that refuted Mr. Morgan's testimony. First, the City submitted the Third Declaration of Bill Gore (Dkt No. 77), which stated:

4) Planning Department staff, at my request, on two separate occasions measured between the proposed new sign location as shown on the site plan and the closest pre-existing billboard. Using the methodology of the ordinance in effect at the time of the initial application (as closely as possible given traffic and

vehicular safety concerns) the distance between these two points was measures as being less than eight hundred (800) feet. This measurement was taken using a measurement "wheel," as is the standard practice of this department.

5) In addition to the "wheel" measurement referred to above, I have also performed a measurement of the type described in the prior ordinance using computerized orthophotos and computerized measuring tools. I utilized this technique at various times in the normal course of conducting the business of my Department. Utilizing this method the distance between the proposed sign and the pre-existing billboard is approximately 726 feet.

6) Finally, I am aware that a survey by a registered land surveyor with Davis and Floyd was recently conducted between these points using the methodology described in the prior ordinance and revealed a distance of 702.26 feet. A copy of this survey report is attached hereto as Exhibit A.

8) Given the fact that the measurements provided by the wheel and the computer were well below the 1000' minimum and the existence of a survey showing the same, it is my opinion that the proposed location is less than 1000' from a preexisting sign and that any inherent margin of error in either of the measurement techniques discussed above would not be sufficient to alter this result.

The City also submitted the declaration of Mary Cohen, the City employee in the Department of Planning and Management responsible for taking

measurements to establish distances between points for use by the City's Zoning Administrator, Mr. Gore. Ms. Cohen testified that "[u]sing the methodology of the ordinance in effect at the time of the initial application the distance between [the proposed billboard and the preexisting billboard] was less than eight hundred (800) feet."(Dkt No. 77-2, Cohen Declaration, ¶ 5.)

Rule 56(c) of the Federal Rules of Civil Procedure mandates that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any," must show a disputed factual issue exists in the case. Fed.R.Civ.P. 56(c). "This evidence must be based on personal knowledge and must set forth admissible facts." *Reynolds and Reynolds Co. v. Hardee,* 932 F.Supp. 149, 153 (E.D.Va.1996). "To be admissible, a document must be authenticated by 'evidence sufficient to support a finding that the matter in question is what its proponent claims." *Lumoa v. Potter,* 351 F.Supp.2d 426, 430-31 (M.D.N.C. 2004) (quoting Fed.R.Evid. 901(a)). "It is not enough for a witness to tell all [he] knows; [he] must know all [he] tells." *Harrison v. Principi,* 2006 WL 1581807, *7 (D.S.C.) (June 6, 2006) (citing *Carmen v. San Francisco Unified School Dist.,* 237 F.3d 1026, 1028 (9th Cir. 2001)). In the instant matter, Mr. Hudgen's self-serving and conclusory declaration that he "was aware" that the proposed sign was more than 1,000 feet from any other existing "billboard," is insufficient to constitute a genuine issue of fact. In contrast, the testimony of Mr. Gore and Ms. Cohen is clearly capable of supporting a motion for summary judgment. They both testify under oath as to the measurements that

they performed; such information is clearly within their knowledge.

The court granted Covenant's request to respond to the City's Reply brief; as such, Covenant has had an opportunity to submit evidence contradicting the City's evidence. In its Surreply, however, Covenant did not contest the validity of Mr. Gore or Ms. Cohen's measurements. The court therefore finds that there is no genuine issue of material fact that the proposed sign at 2161 Phosphate Road did not comport with the content-neutral requirements of the Ordinance in effect at the time of the filing of the application. Because the application would have been denied even absent the unconstitutional provisions of the sign ordinance, Covenant has no standing to challenge the constitutionality of the denial of this application.

(B) The applications submitted on September 30, 2005, were properly denied under the pending ordinance doctrine.

The South Carolina Supreme Court has approved the "pending ordinance doctrine" as a basis for a municipality to refuse to issue a building permit when such proposed use is repugnant to a pending and later enacted zoning ordinance. *Stratos v. Town of Ravenel,* 297 S.C. 309, 311, 376 S.E.2d 783, 785 (S.C.App.1989); *Sherman v. Reavis,* 273 S.C. 542, 257 S.E.2d 735 (1979). It is uncontested that all of Covenant's billboard permit applications would be denied under the Amended Ordinance. The City asserts that because the pending ordinance doctrine sanctions the denial of the twenty-five applications

filed after the commencement of the amendment process, regardless of the unconstitutional provisions of the prior regulations, Covenant has no standing to challenge the constitutionality of the denial of these applications.

Covenant argues that the City's reliance on the pending ordinance doctrine is mislaid. Covenant asserts that the pending ordinance doctrine only bars applications filed during the pending change in an ordinance if filed with actual knowledge of the impending zoning change. Covenant claims to have had no knowledge that the City was contemplating an amendment to its sign regulations, and therefore asserts that its later-filed applications are not barred.

In response to Covenant's claim that it had no knowledge of the pending change in the sign ordinance, the City submitted in its reply the affidavit of Derk Van Raalte, Deputy City Attorney for the City. Mr. Van Raalte asserted that the City, in response to a request for admission # 13, "The City has considered revisions to its sign regulations since the filing of the above captioned-litigation," answered "Admit." Mr. Van Raalte testified that the City gave this admission to Covenant prior to the filing of the additional sign applications. As such, and also from the local newspaper's publication regarding the pending change and the public hearing, the City claimed that Covenant did have actual and constructive knowledge of the pending change in the sign ordinance. Covenant, after the court granted leave to file a Surreply, submitted further evidence

that it had no actual knowledge of the City's plan to change the prior sign ordinance.

Contrary to Covenant's assertion, an applicant's actual knowledge of the pending change is not required for the pending ordinance doctrine to bar the issuance of a permit. Under the pending ordinance doctrine, courts have recognized that,

it would be utterly illogical to hold that, after a zoning commission had prepared a comprehensive zoning ordinance or an amendment thereto, which was on file and open to public inspection and upon which public hearings had been held, and while the ordinance was under consideration, any person could by merely filing an application compel the municipality to issue a permit which would allow him to establish a use which he either knew *or could have known* would be forbidden by the proposed ordinance, and by so doing nullify the entire work of the municipality in endeavoring to carry out the purpose for which the zoning law was enacted.

*Sherman,* 273 S.C. at 546. Accordingly, the proper inquiry is not whether Covenant had actual knowledge of the pending change, but whether the City had begun the statutory procedure prescribed for amending the ordinance such that the amendment can be considered "pending" at the time the application is filed.

The South Carolina Supreme Court carefully delineated that "[a]n ordinance is legally pending when the governing body has resolved to consider a particular scheme of rezoning and has advertised to

the public its intention to hold public hearings on the rezoning." *Sherman,* 257 S.E.2d at 737. In *Sherman* and the cases it cites, the particular rezoning proposal under consideration had already been recommended in detail to the city council by its planning staff and thus had reached "an advanced stage" of the statutory procedure prescribed for rezoning. *Id.* at 736. Where, by contrast, a county council's purported generalized interest in rezoning had not even reached the first statutory step, *i.e.,* the referral of the matter for full consideration to the county zoning and planning commission, the Fourth Circuit, interpreting South Carolina law, held that the pending ordinance doctrine could not bar the acceptance of the application. *Scott v. Greenville County,* 716 F.2d 1409, 1419, n. 10 (4th Cir. 1983). In *Scott,* the Fourth Circuit found notable that the case authority from Pennsylvania upon which the South Carolina Supreme Court based its adoption of the "pending ordinance" doctrine flatly rejected the view that an ordinance could be considered pending as of the time the governing body first announced an intention to consider rezoning and refers the matter to its zoning commission. *Id.* (citing *Casey v. Zoning Hearing Board of Warwick Township,* 459 Pa. 219, 328 A.2d 464, 467 (1974)). The application of the pending ordinance doctrine therefore depends upon whether the applications were filed before or after the City had properly (1) resolved to consider amending the sign ordinance and (2) advertised to the public its intention to hold public hearings on the amendment.

In this case, the following sequence of events is uncontested: The City Council had the first reading

of a proposed repeal of the existing sign ordinance and the adoption of a new sign law providing for a content-neutral total ban of all new billboards on September 15, 2005. On September 28, 2005, the City published notice in the Post & Courier of upcoming public hearing in which the City Council would vote on the proposed adoption of the Amended Ordinance.[3] On September 30, 2005, Covenant submitted to the City twenty-five additional applications for billboard permits.[4] These applications were marked as "received" by the City

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[3] In South Carolina, the procedure for enacting or amending zoning regulations is codified at South Carolina Code section 6-29-760. This provision of the Code states,

> Before enacting or amending any zoning regulations or maps, the governing authority or the planning commission, if authorized by the governing authority, shall hold a public hearing on it, which must be advertised and conducted according to lawfully prescribed procedures. If no established procedures exist, then at least fifteen days' notice of the time and place of the public hearing must be given in a newspaper of general circulation in the municipality or county.

S.C. Code Ann. § 6-29-760 (2004). The court finds that the City's publication of notice in the Post & Courier fifteen days before the October 13 meeting in which the Amended Ordinance was finally adopted was adequate and timely.

[4] These twenty-five applications were sent to the City accompanied by a letter from Covenant's attorney, Mr. Franklin Lemond. The letter, which is attached as an exhibit to the City's Reply brief, is dated September 30, 2005 and marked as "received" by the City's attorney on October 3, 2005. In its Surreply, Covenant did not dispute that the letter and applications were sent on September 30; Covenant only asserts that the applications were submitted "in September of 2005." (Pl. Surreply at 2.) As such, considering the evidence in the light most favorable to Covenant, the court finds that September 30, 2005, is the earliest date the applications could have been submitted.

on October 3, 2005. On October 13, 2005, the City Council approved by unanimous vote the ratification of Amended Ordinance.

Because Covenant submitted the applications two days *after* the City had published timely and adequate notice of its intention to hold a public hearing to amend the existing sign ordinance, the pending ordinance doctrine bars acceptance of those applications, regardless of whether Covenant had actual knowledge of the proposed amendments.[5] The court therefore finds that these applications would have been denied regardless of the unconstitutional provisions of the City's prior sign ordinance. Covenant therefore has no standing to challenge the unconstitutional provisions of the prior ordinance, as those provisions caused no injury to Covenant.

(C) Overbreadth Doctrine

Covenant argues that, even if it can not fulfill the general requirements for standing, it has standing to challenge the prior ordinance under the First Amendment "overbreadth doctrine." The Supreme Court has stated that "[i]t has long been recognized

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[5] Covenant also argues that because notice was not published for the hearing in which the City performed the first reading of the proposed change, the statutory notice requirements were not followed and the pending ordinance doctrine does not apply. The South Carolina Code does not require that the City publish newspaper notice of the meeting in which the first reading is conducted. *See* S.C. Code Ann. § 6-29-760 (2004); *see also Brown v. County of Charleston*, 303 S.C. 245 (S.C.App.1990). Accordingly, the City performed the proper notice procedure in amending the sign ordinance so as to warrant the application of the pending ordinance doctrine.

that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma,* 413 U.S. 601, 611, 93 S.Ct. 2908, 2915 (1973) (citing *Herndon v. Lowry,* 301 U.S. 242, 258, 57 S.Ct. 732, 739, 81 L.Ed. 1066 (1937); *Shelton v. Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960)). As a corollary, the Supreme Court altered its traditional rules of standing to permit-in a limited First Amendment area-"attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Broadrick,* 413 U.S. at 612, 93 S.Ct. at 2916. Under this overbreadth doctrine, "[l]itigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* Such a departure from traditional standing requirements is considered necessary to prevent the chilling effect an overly broad statute may have on one's right to free speech.

Covenant's claim that the overbreadth doctrine saves it from having to satisfy standing requirements is without merit. The justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. *Bates v. State Bar of*

*Arizona,* 433 U.S. 350, 380-381, 97 S.Ct. 2691, 2707-2708 (1977). The Supreme Court has recognized that there are 'commonsense differences' between commercial speech and other varieties. *Id.* "Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." *Id.* Further, the justification for the application of the overbreadth analysis disappears entirely when, as in this case, the challenged statute is no longer in effect. The overbreadth doctrine has been described by the Supreme Court as 'strong medicine,' which 'has been employed ... sparingly and only as a last resort,' *Broadrick v. Oklahoma,* 413 U.S. at 613, 93 S.Ct. at 2916; accordingly, the court declines to apply it to allow a challenge of a now-defunct regulation of commercial speech.

Both Covenant's original sign application and its twenty-five later-filed applications would have been denied even if the unconstitutional provisions of the City's prior regulations had been stricken. In this context, the overbreadth doctrine does not relieve Covenant of its obligation to satisfy the traceability and redressability requirements for standing. As such, Covenant has not shown that its injury is fairly traceable to the unconstitutional provisions of the City's prior ordinance, nor has it shown that its injury is likely to be redressed by the requested relief; therefore, Covenant has no standing to challenge the City's prior ordinance. Accordingly, all of Covenant's claims against the City must be dismissed, and Covenant's pending motion must be dismissed as moot.

It is therefore ORDERED, for the foregoing reasons, that Defendant City of North Charleston's Motion for Summary Judgment is GRANTED as to all claims and Plaintiff Covenant Media of South Carolina, L.L.C.'s Motion for Partial Summary Judgment is DISMISSED.

AND IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 3, 2007

No. 06-1894
2:05-cv-01394-PMD

COVENANT MEDIA OF SOUTH CAROLINA LLC
Plaintiff - Appellant

v.

THE CITY OF NORTH CHARLESTON
Defendant - Appellee

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SCENIC AMERICA
Amicus Supporting Appellee

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On Petition for Rehearing and Rehearing En Banc

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The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Williams, Judge Traxler, and Judge Shedd.

For the Court,

/s/ Patricia S. Connor

CLERK

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No. 07-587

FILED
NOV 30 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

COVENANT MEDIA OF SOUTH CAROLINA, LLC,

*Petitioner,*

*v.*

CITY OF NORTH CHARLESTON, SOUTH CAROLINA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## OVERVIEW OF THE CASE

This case is about a permit to erect one new billboard structure. The application was denied because the proposed sign seriously violated a rule requiring a 1000' separation between billboards. The denial was delayed because the application was misplaced.

Petitioner Covenant Media grieves the time lost waiting for a decision. The application sought permission to install a new billboard structure on which outdoor advertising messages might be posted *after* installation was complete. Covenant's claim of "response delay" damages arose from the fact that a counter clerk apparently lost the application. This claim was rejected — in both its "as applied" and "facial" forms — by the Fourth Circuit. The "as applied" challenge was rejected because a merely negligent error is not compensable under 42 U.S.C. § 1983. Covenant does not seek this Court's review of that ruling.

The Fourth Circuit rejected the facial challenge because the relevant provision of the sign ordinance was content neutral, and thus, under *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S. Ct. 775 (2002), the sign ordinance was not constitutionally required to explicitly state a "time limit" for decision. It is only this latter ruling with which Covenant now takes exception, and on which it seeks this Court's review.

Despite Covenant's mistaken framing of the issue, there is no "prior restraint on speech" in this case. The relevant aspects of the City's sign ordinance dealt only with location and safety rules for new physical

structures, and ignored all message content. The distinction between installation of a new structure and later placement of advertisements thereon is crucial. The City's old sign ordinance — in effect when the application was submitted — required billboard companies wishing to erect new sign structures to apply for, and be granted, a permit. In contrast, persons wishing to "post a message" on the display face of an existing billboard structure could do so freely, without any form of prior approval from the City. Fourth Circuit Joint Appendix ("JA") p. 206, para. 6. Thus, the permit about which Covenant Media complains was triggered exclusively by its desire to undertake construction activity. Covenant's Petition glosses over this critical difference.

The Petition opens the Overview with the assertion that "Covenant Media submitted an application for permission to *post* one advertising sign. . . ." The erection of a new billboard structure cannot properly be called "posting a sign." That phrase, constantly misused by billboard companies, is appropriate only for "hanging vinyl" on the display face of an existing billboard, or to small, hand-painted signs on which the message is placed before the sign is installed. As a result of Covenant's misleading phrasing, great care must be taken to maintain focus on the true nature of the controversy.

## FACTUAL BACKGROUND

On December 1, 2004, Petitioner Covenant Media of South Carolina submitted to the City of North Charleston, South Carolina an application to install one new billboard structure. JA p. 203, para.2; JA p. 154, para. 10. Counter staff at the City apparently misplaced the application. Petition Appendix ("PA") p. 29a. In the ensuing six months, Covenant never contacted the City to ask about the status of its application. PA p. 5a. Instead, Covenant's lawsuit, filed "out of the blue" in May of 2005, was a complete surprise to the City. PA p. 29a. Even after the suit was filed, Covenant took nearly six more months — until September 21, 2005 — to provide the City with a copy of the missing application. PA p. 29a. Once the application was resubmitted, the City responded in approximately three weeks. PA p. 29a.

The new sign structure was proposed to be located less than 800 feet from a pre-existing billboard structure. PA p. 48a. Since the sign ordinance required at least 1000' separation between billboards — a content neutral, narrow, objective standard if ever there was one — the City had no choice but to deny the application. It did so. PA p. 8a-9a.

Although the old sign ordinance did not contain an express time limit for decision on a permit application, PA p. 5a, the City's long-established administrative practice was to provide responses to permit applications within thirty days. JA p. 207, para 11. In addition to the administrative practice, the old sign ordinance explicitly required the Zoning Administrator to provide a response, and explicitly stated that such response was

subject to internal appeal. JA p. 47, Section 7-1 (zoning administrator "shall issue permits where such applications are in accord with the provisions of this ordinance. . . ."); see also JA p. 48, Section 7-2 (permit denials must be in writing), and JA p. 205 (4). Thus, Covenant's assertion that under the old ordinance "the City was never required to pass judgment on a sign application," Petition at 3, is plainly wrong.

On October 13, 2005, the City adopted a new sign code that, among other things, included express time limits for response and imposed a complete ban on all new billboards. JA pp. 5a-7a.

On July 12, 2006 the District Court granted summary judgment to the City, based in part on its determination that Covenant lacked standing. PA p. 38a. The District Court recognized that, whatever constitutional problems might have existed in the prior ordinance, Covenant still could not have built its proposed structure due to the clear violation of the 1000' spacing requirement. PA p. 50a.

The Fourth Circuit affirmed the District Court's result, albeit in part on different reasoning. PA p. 13a, *Covenant Media v. North Charleston*, 493 F.3d 421 (4th Cir. 2007). The Fourth Circuit concluded that Covenant had standing to present a claim arising from the time the City took to respond to the application. *Id.* The Fourth Circuit therefore considered on the merits Covenant's facial attack, which asserted that the ordinance's lack of a specified response time was a *per se* violation of the procedural safeguard rule of *Freedman v. Maryland*, 380 U.S. 51, 58, 85 S. Ct. 734 (1965). PA p. 28a.

As to the as applied argument, the Fourth Circuit concluded that Covenant could not recover damages for a delay based on mere negligence. Thus, the damage claim was not cognizable under 42 U.S.C. § 1983. PA pp. 30a-31a. However, the Fourth Circuit did state that any *intentional* unreasonable delay is actionable. PA pp. 13a, 31a-32a.

As to the facial argument, the Fourth Circuit ruled that the lack of a specified response time in the City's content neutral ordinance was not a *per se* constitutional deprivation because, under *Thomas v. Chicago Park District*, 534 U.S. 316, 320, 122 S. Ct. 775 (2002), the *Freedman* time limit for decision was not constitutionally required. PA p. 28a.

Covenant's Petition does not seek this Court's review of the Fourth Circuit's holding that the relevant portion of the City's ordinance was content neutral. PA p. 22a-23a. Nor does it assert unconstitutionality of the 1000' separation rule. Instead, it claims that the constitution requires an explicit time limit for decision on a permit to install a new physical device, even when the permit process does not consider potential messages.

## REASONS FOR DENYING THE PETITION

The Petition does not present a case worthy of this Court's full consideration. This Court has not established a single rule for all factual contexts raising free speech issues. *See Metromedia v. San Diego*, 453 U.S. 490, 501, 101 S. Ct. 2882 (1981). Thus, conflating lines of First Amendment precedent is about as useful as bringing a baseball bat to a soccer match. Unfortunately, Petitioner has done precisely that.

There are a number of reasons, each independently sufficient, why the Petition should be denied. *First*, this case does not truly present a question of prior restraint on speech. *Second*, there is no significant split between the circuits on the issues present in this case. When structural, location and safety rules (the subject of this case) are separated from prior restraints on protected speech and expressive conduct, there is remarkable consistency in the lower court decisions. *Third*, Covenant is incorrect when it asserts that *Thomas* is limited exclusively to public forum cases. *Fourth*, Covenant's description of the Fourth Circuit's ruling, laced with hyperbole, suggests non-existent horrors. The Fourth Circuit has not announced a rule that cities may decide with impunity "never to respond" to speech-related permit requests. Thus, there is no grave error in need of correction. *Fifth* and finally, on its facts, this case would be a poor one with which to revisit *Thomas*, even if this Court were so inclined.

## I. THERE IS NO PRIOR RESTRAINT ON SPEECH OR EXPRESSIVE CONDUCT IN THIS CASE

Contrary to Covenant's assertion, the billboard permit at issue in this case simply did not involve "*speech activity* subject to governmental approval." Petition at p. 6 and pp. 10-11; italic added. The City's permit requirement was triggered by Petitioner's proposal to install a new sign structure. There is no expressive conduct in that construction project.

The determination of whether a challenged regulation is directed at *speech* — in the constitutional sense — is a threshold issue in any free speech analysis. Regulations not directed at speech are constitutional even when they have an incidental effect on speech. *Erie v. Pap's A.M.*, 529 U.S. 277, 294-295, 120 S. Ct. 1382 (2000). Conversely, regulation based on message content or category is subject to strict scrutiny. *Burson v. Freeman*, 504 U.S. 191, 112 S. Ct. 1846 (1992), *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 92 S. Ct. 2886 (1972). Thus, a threshold inquiry in any free speech case is to determine whether the relevant provision directly regulates protected speech and / or expressive conduct. Here the permit did not.

Expressive conduct, in the context of new billboards, begins only after the physical structure is installed. Communication begins only when vinyl sheets, printed with communicative images, are attached to the display face of an existing billboard structure. Even then, the speaker is the sign company's rent-paying advertising client, *not* the sign company.

As the Fourth Circuit noted in its decision, "Similarly, the Sign Ordinance was adopted to regulate land use, not to stymie any particular message. And North Charleston's interests in regulating signs were completely unrelated to the messages displayed. . . ." *Covenant Media, supra*, 493 F.3d at 433, 434. Other cases of similar tenor: *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993, *en banc*; *cert denied*, 511 U.S. 1085 (1994)) ("The building of a newsstand is simply not a form of constitutionally protected expression. . . . Requiring a permit for the structure is not a prior restraint on speech") opinion of Manion, 9 F.3d at 1314; (*Graff* is cited in *Thomas, supra*, 534 U.S. at 326); *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 7 P.3d 136, 139 (AZ App. 2000) (dispute over a rule regarding where a billboard light source could be placed; since the rule did not affect the ad message, it *did not affect any aspect of communicative speech*, and did not burden any fundamental right); *Asselin v. Town of Conway*, 137 N.H. 368, 373, 628 A.2d 247, 251 (NH 1993) (prohibition on internally lighted signs did not impair freedom of expression).

Under both the prior and new sign ordinances, the City had no permitting system for "*actual content*," *i.e.*, individual messages to be displayed on existing billboards. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759-760, 108 S. Ct. 2138 (1988). Nor did it regulate classes of speech which could be displayed on pre-existing billboards, as was the case in *Metromedia, supra*, 453 U.S. at 512-514 (favoring of commercial messages over non-commercial).

This Court has created a test for deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play. That test asks whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 403-404, 109 S. Ct. 2533 (1989), *Spence v. State of Washington*, 418 U.S. 405, 94 S. Ct. 2727 (1974).

There is nothing in the process of installing a new billboard that satisfies the "expressive conduct" test of *Texas v. Johnson*. Billboards are huge, multi-ton steel structures. *Horizon Outdoor v. City of Industry*, 2003 WL 24135456, *1. In addition to sign permits, they are typically subject to electrical and building permits, *Virtual Media Group v. San Matteo*, 66 Fed.Appx. 129 (ND CA 2003). Billboards are manufactured in special steel fabrication plants, transported to the site, and then installed by a construction crew using heavy equipment. For descriptions of the installation process, and physical injuries that sometimes occur during it, see: *Trinity Outdoor v. Phoenix Structures*, 2005 WL 2253902 (ED TN 2005), and *Electric Service Co. of Montgomery, Inc. v. Dyess*, 565 So.2d 244 (AL 1990). When installing the structures, the construction workers do not intend to express any particular thought or message; they are only doing their job. Observant passers-by would never think that the installers are trying to communicate any particular message. The billboard installation process clearly fails the *Texas v. Johnson* test.

Another factor shows that installation of a new billboard is not communicative. Billboard companies are in the business of facilitating the speech of others — their advertising customers. This Court has rejected the theory that facilitating the speech of others is in itself a communicative activity. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88, 100 S. Ct. 2035 (1980), this Court rejected the idea that the views of persons gathering petition signatures at a shopping mall would be attributed to the owners of the mall. Similarly, just last year the Court held that accommodating military recruiters on law school campuses did not mean that the schools were being forced to endorse the military message. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 64, 126 S. Ct. 1297 (2006). Based on these precedents it is clear that billboard companies are *not* engaging in free speech when they display the messages of their customers. This is especially true when the billboards do not exist and the advertisers are unknown.

Because there is no speech or expressive conduct in the installation of a new billboard, and the permit system regulated only installation of new billboards, the City's permit scheme did not operate as a prior restraint on free speech or expressive conduct. Accordingly, Petitioner is not entitled to damages, or even declaratory relief, stemming from procedural rules announced in *Freedman* and *FW/PBS v. Dallas*, 493 U.S. 215, 110 S. Ct. 596 (1990).

## II. THERE IS NO SIGNIFICANT SPLIT BETWEEN THE FOURTH CIRCUIT AND OTHER COURTS

Petitioner suggests a significant split between the Fourth Circuit and other courts. No such split exists. The Petition repeatedly conflates distinct lines of cases in at least two regards: (a) Petitioner erroneously presents "core speech" cases in support of its demand for procedural safeguards in this "construction project" context; and (b) Petitioner claims a circuit split regarding *Thomas* and "decision time limit" requirement. In each instance the claimed disparity between the positions disappears when the cases are analyzed in their applicable factual contexts.

### a. Petitioner's "procedural safeguard" cases are not apropos regarding the non-communicative "construction" activity that triggered the North Charleston permit requirement.

The cases cited by Petitioner as support for *Freedman* safeguards come with factual settings that distance them from the narrow issue present in this case. When Petitioner's cases involving communicative conduct by live human beings and / or individual media creations are separated from the cases involving physical structures, the Fourth Circuit's ruling in this case is not at odds with prior precedent, or sister circuit precedent. Put another way, the cases offered by Petitioner as examples of circuits demanding a decisional time limit for content-neutral permitting systems do not turn on questions about physical structures, as presented in this case.

Petitioner's cited cases can readily be grouped in this fashion. The cases demanding a time limit for decision all involved either live human beings engaged in some expressive activity, or individual review of *specific* media creations (books, photographs or films), that were expressive in some way. *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734 (1965) (censorship board reviewed individual films in advance of public exhibition); *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116 (1965) (law criminalizing political activity and propaganda); *Teitel Film v. Cusack*, 390 U.S. 139, 88 S. Ct. 754 (1968) (censorship board review of individual films); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 89 S. Ct. 347 (1968) (injunction prohibiting political rally by "white supremacist" group); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S. Ct. 935 (1969) (law criminalizing participation in parade without a permit); *Blount v. Rizzi*, 400 U.S. 410, 91 S. Ct. 423 (1971) (placing allegedly obscene materials in the mail); *United States v. Thirty Seven Photographs*, 402 U.S. 363, 91 S. Ct. 1400 (1971) (seizure by Customs agents of allegedly obscene photographs); *Southeastern Promotions v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239 (1975) (denial of use of municipal auditorium for a specific, live stage show); *McKinney v. Alabama*, 424 U.S. 669, 96 S. Ct. 1189 (1976) (selling of obscene materials); *National Socialist Party v. Skokie*, 432 U.S. 43, 97 S. Ct. 2205 (1977) (injunction against persons wearing swastikas); *Vance v. Universal Amusement*, 445 U.S. 308, 100 S. Ct. 1156 (1980) (prior review of individual films); *MIC v. Bedford*, 463 U.S. 1341, 104 S. Ct. 17 (1983) (injunction forbidding exhibition of two specific films); *Riley v. National Federation of the Blind*, 487 U.S. 781, 108 S. Ct. 2267 (1988) (solicitation of funds for charitable purposes);

*FW/PBS v. Dallas*, 493 U.S. 215 (1990) (operation of sexually oriented business). None of these cases involved permit systems for construction or erection of physical structures. When grouped in this fashion it becomes clear that the Fourth Circuit's *Covenant Media* opinion is not at odds with Petitioner's cited cases.

Although *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (not mentioned in the Petition) involved physical devices — news racks — this Court was careful to point out the unusual factors which made it a free speech / press freedom case: even after the city had given permission for installation of the news rack, the newspaper still had to apply annually for news rack licenses. Though this was not as threatening as a classical prior restraint on "*actual content*," it was sufficiently threatening to invite judicial concern. 486 U.S. 759-760.

**b. Petitioner is also mistaken in suggesting its cited cases demonstrate a circuit split with respect to *Thomas* and require procedural safeguards for content-neutral time, place, and manner restrictions.**

Covenant chases mirages when claiming the existence of a circuit split with regard to *Thomas* and the time limits for decision issue. The First, Fourth, Ninth, and Eleventh Circuits generally interpret *Thomas* to allow flexibility in terms of whether a content neutral time, place, and manner regulation must contain an express time limit for administrative decisions. In fact, all four of the cases cited by Covenant as evidence of a circuit split appear on close examination to be either consistent with the Fourth Circuit's approach, or distinguishable on the facts.

Covenant cites *Encore Video, Inc. v. City of San Antonio*, 330 F.3d 288, 296 (5th Cir. 2003), as both evidence of a circuit split and as a case expressly interpreting *Thomas* as applicable only to public forum cases. It is neither.

This court has long held that each medium of expression must be evaluated according to its particular characteristics. *Metromedia, supra*, 453 U.S. at 501 ("Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method. We deal here with the law of billboards.") This truism dispels Petitioner's ability to rely on *Encore Video* in support of its argument here.

*Encore Video* was an adult business case, not a billboard case. Thus, the Fifth Circuit's decision to follow *FW/PBS* (as opposed to *Thomas*) is hardly surprising, since *FW/PBS* provides specific guidance in the context of regulation of adult businesses. The Fifth Circuit specifically pointed out this factor: "Like *FW/PBS* and *unlike Thomas* — which addressed a demonstration permit system for public parks — *this case addresses a licensing scheme for adult businesses.*" *Encore Video*, 330 F.3d at 296, n. 12 (emphasis added.) While the Fifth Circuit did say that "[t]he present case does not concern 'regulation of the use of a public forum'" as in *Thomas*, it stopped short of actually ruling that *Thomas only* applied to public forum cases. Read carefully, it simply distinguishes *Thomas* in the course of determining that *FW/PBS* continues to set the standard in the context of sexually oriented businesses.

Covenant's cited Seventh Circuit case, *Southworth v. Board of Regents*, 307 F.3d 566 (7th Cir. 2002), also does not evidence the split Covenant seeks to demonstrate. It is not a sign case; it does involve installation of new structures. It concerns use of mandatory student activity fees to fund controversial student groups. Thus, the distinction between medium and message — crucial in this case — is not present in *Southworth*.

The analysis in *Southworth* does not speak on the critical issue of whether time limits for decision must be explicitly stated in an ordinance that operates as a content neutral, time, place, and manner regulation; indeed, decisional time limits were not even an issue. The Seventh Circuit repeatedly characterized its situation, and the authorities upon which it relied, as "unbridled discretion" cases. *Id.* at 574.

The *Southworth* court reasoned that standardless decision making invited content censorship in a way that was difficult to police after the fact. As a result, the presence or absence of narrow, objective standards was a key to determining whether the scheme before it was content neutral. *Id.* at 577.

The *Southworth* court analyzed Thomas only on the question of what constituted "unbridled discretion" sufficient to preclude a finding of content-neutrality, 307 F.3d at 589, and viewed time limit standards as one factor to consider. Under the logic of *Southworth*, the absence of time limits *along with other types of standards* might cause a court to conclude that an ordinance is content based. If that inquiry yields "yes, it is content-based," then the relaxed standard under *Thomas* would be unavailable, since it is reserved only for content-neutral ordinance reviews.

*Southworth* does not say that *Freedman* time limits must be present in order to uphold a time, place, and manner restriction that has *already passed* the test of being content neutral. That distinction, and the structure / image distinction, set *Southworth* apart from this case.

The Fourth Circuit expressly found the relevant portion of the North Charleston ordinance to be content neutral. PA pp. 22a-23a. Covenant does not seek review of that ruling. Thus, *Southworth* is completely silent on the question presented by Covenant's Petition. Read in this manner, it does not present a conflict with the positions of the First, Fourth, Ninth, and Eleventh Circuits as Covenant asserts.

*Riel v. Bradford*, 485 F.3d 736 (3d Cir. 2007), is easily distinguished. The case concerned hand-painted, temporary, political protest signs. *Id.* at 740. Unlike billboards, such signs are typically one-use devices; the message is painted on before the sign — usually a sheet of plywood — is installed or displayed. In contrast, the billboards at issue here are large permanent structures, usually made of heavy-duty steel, which must be installed before the decades-long chain of periodically changing messages can begin.[1] Thus, the distinction between medium and message — crucial to this case — did not apply in *Riel*. Furthermore, the question in *Riel* was not *whether* a time limit for decision is constitutionally required, but rather, whether the explicit limit chosen — 30 days — was *reasonable*. *Riel*, 485 F.3d at 756. *Riel* did not address the issue raised by the Petition, and therefore is irrelevant.

1. *Metromedia*, *supra*, 453 U.S. at 511 ("[T]he city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising.")

Like *Riel*, *Lusk v. Village of Cold Spring*, 475 F.3d 480 (2d Cir. 2007) was a case involving one-use, hand-painted political protest signs. "In June 2004, Lusk began placing signs, which appear from pictures of them included in the record to have been made by applying spray paint to large pieces of plywood, on or leaning against his front porch. The signs conveyed Lusk's protest against a real estate development . . . ." *Id.* at 481-82. Thus, once again, the message vs. medium distinction, essential to this case, could not be made. Given the factual setting, and the urgency of the public hearing which Mr. Lusk was encouraging his neighbors to attend, it is not surprising that the court found unconstitutional the time-consuming procedure applicable to permits for temporary political signs.

Furthermore, *Lusk* actually reflects the Fourth Circuit's interpretation of *Thomas*, rather than taking exception to it. The *Lusk* court expressly recognized that "[i]n *Thomas*, the Court did indeed hold that the *Freedman* requirements for constitutional prior restraints . . . did not apply to content-neutral regulations." *Id.* at 492, n. 14. That is exactly what the First, Fourth, Ninth and Eleventh Circuits say on the same point.

It is also odd that Covenant cites *Lusk*, since it is not a *Thomas*-based case at all. *Lusk* specifically found that the Cold Spring ordinance fell under *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2083 (1994). *Lusk* , 475 F.3d at 490-92. It described *Ladue* as applying to the narrow situation in which the regulation barred an "entire medium" and hence constituted an "impermissibly broad ban on speech." *Id.* at 490-92;

*see also Ladue*, 512 U.S. at 55 (the court has "particular concern with laws that foreclose an entire medium of expression.") The *Lusk* court believed this factor took the Cold Spring ordinance out of the reach of the *Thomas* time, place, manner analysis and placed it into the *Ladue* line. 475 F.3d at 490-491. The court went so far as to signal readers that it was not confronting a *Thomas* or *FW/PBS* case at all. *Lusk*, 475 F.3d at 492, n. 14, stating: "[b]ut here, *even if these [Freedman] factors were apposite* under a *City of Ladue* analysis . . .", thus implying that they are not actually relevant under *Ladue*.) (emphasis added) Rather than demonstrating a conflict, *Lusk* suggests that the Fifth Circuit is harmonious with the First, Fourth, Ninth, and Eleventh circuits.

Petitioner fails to cite to any case involving permits for new billboards which holds that a specific, explicit, short time limit on permit decisions is constitutionally required when the sign ordinance operates in a content-neutral manner, or applies only to structural, location, and safety issues, as is the undisputed and decisive fact in this case. The cases which have considered the decision time limit issue in the context of new billboards permits have all rejected Covenant's position.

The earliest post-*Thomas* case to analyze the decisional time limit issue in the specific factual context of this case — permits for new billboards — is *Granite State Outdoor Advertising v. City of St. Petersburg*, 348 F.3d 1278 (11th Cir. 2003), *rehearing and hearing en banc denied*, 90 Fed.Appx. 390 (Table), *cert. denied*, 541 U.S. 1086 (2004). The District Court had ruled that the time limit was constitutionally required, but the Eleventh

Circuit, after carefully analyzing *Freedman* and *FW/PBS*, found the issue controlled by *Thomas*, and reversed. It held:

> We realize City officials could potentially delay the processing of certain permit applications and thereby arbitrarily suppress disfavored speech. We will not, however, address hypothetical constitutional violations in the abstract. As the Supreme Court noted in *Thomas*, we believe 'abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements.' *Id.* [534 U.S.] at 325. Furthermore, we are reluctant to invalidate an entire legitimately-enacted ordinance absent more of a showing it is as problematic as Granite claims. . . . [W]e reverse on this point and hold that the lack of time limits is constitutionally acceptable.

*St. Petersburg*, 348 F.3d at 1282.

The Eleventh Circuit reiterated this point in *Granite State Outdoor v. Clearwater*, 351 F.3d 1112 (11th Cir. 2003), *rehearing and hearing en banc denied*, 97 Fed.Appx. 908 (2004), *cert. denied*, 543 U.S. 813 (2004), stating:

> The [*Lakewood v. Plain Dealer*, 486 U.S. 750 (1988)] majority noted, however, that "even if judicial review were relatively speedy, such review cannot substitute for concrete

> standards to guide the decision-maker's discretion." *Id.*, 108 S. Ct. at 2151. Thus, time limits are required when their lack could result in censorship of certain viewpoints or ideas, see, *e.g.*, *Freedman v. Maryland*, . . . but are not categorically required when the permitting scheme is content-neutral.

*Clearwater*, 351 F.3d at 1119.

District court decisions involving permits for new billboards are consistently in accord. *Covenant Media v. City of Huntington Park*, 377 F.Supp.2d 828, fn 37 (CD CA 2005); *Advantage Advertising, L.L.C. v. City of Pelham, Al.*, 2004 WL 3362497 *6, *7 (ND AL 2004); *Advantage Advertising, LLC v. City of Hoover, Al.*, 200 Fed.Appx. 831, 834 (11th Cir. 2006); *Lockridge v. City of Oldsmar, Fl.*, 475 F.Supp.2d 1240, 1255 (MD FL 2007); *RSWW v. City of Keego Harbor*, 2006 WL 1155228 *4 (ED MI 2006); *Norton Outdoor Advertising. v. Pierce Township*, 2007 WL 1577747 *7 (SD OH 2007).

In summary: There is no split between the circuits within the line of cases concerning permits for new billboards. All reported decisions hold that if the applicable rules are content-neutral, then there is no constitutional requirement for a time limit on permit decisions.

## III. *THOMAS* IS NOT LIMITED TO PUBLIC FORUM CASES

Covenant makes too much of too little when it suggests that *Thomas* applies only in public forum cases. Ironically, the Petition itself cites cases at odds with Covenant's suggestion that a different analysis is required depending on the ownership of real property. For instance, in *Riel, supra*, the court expressly rejected the plaintiff's "attempt to create a split between those [Supreme Court sign cases] involving bans on private and public property." 485 F.3d at 746-47. Similarly, the court in *Southworth, supra*, rejected the university's "argument that the constitutional standards set forth in permit and licensing cases involving access to a physical forum, such as a park or city street, do not apply to a metaphysical forum of money. . . ." 307 F.3d at 580. Finally, *Lusk, supra*, does not definitively support Covenant's position. Read carefully, *Lusk* only tells readers that *Thomas* did not apply to the *Ladue* line of cases involving a complete ban on an entire medium. Thus, any attempt by Petitioner to distinguish *Thomas* from *Covenant Media* on public forum grounds would not find bedrock support even in the cases it cited.

## IV. PETITIONER MISCONSTRUES THE FOURTH CIRCUIT'S HOLDING

Covenant overstates the Fourth Circuit's holding when it claims that under the *North Charleston* ruling "permits for speech activity can be held indefinitely so long as the regulation is not based on content. . . ." Petition at p. 5. The Fourth Circuit did not so hold.

To the contrary, the Fourth Circuit's analysis specifically demonstrates that cities can be liable for damages associated with delays in responding to applications. PA pp. 13a, 31a-32a. If Covenant had made any effort to inquire with the City, and the City still refused to timely respond, "such refusal may have established that the City intentionally refused to act . . . or was deliberately indifferent to the consequence of having a Sign Regulation that lacked procedural safeguards." *Id.*

Notably, though, Covenant never made any such attempt to inquire with the City. As a result, its claim of constitutional infringement was based solely on the unintentional, negligent loss of a document by a counter clerk. The Fourth Circuit was correct in recognizing that such negligence is not, without more, enough to show a violation of constitutional rights.

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

*Monell v. Dept. of Social Services*, 436 U.S. 658, 694-695, 98 S. Ct. 2018 (1978). *See also Pembaur v. Cincinatti*, 475 U.S. 469, 483, 106 S. Ct. 1292 (1986) ("municipal liability under 1983 attaches where — and only where — a deliberate choice to follow a course of action is made

from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question"); *Daniels v. Williams*, 474 U.S. 327, 330, 106 S. Ct. 662 (1986) (mere negligence may not be enough to state a Section 1983 claim); *Parratt v Taylor*, 451 U.S. 527, 543, 101 S. Ct. 1908 (1981) (deprivation of property is a due process violation only when it occurs "as a result of some established state procedure.") And this makes sense. Unintentional, negligent acts are just that — mistaken actions or omissions, not execution of policy. They are not "deliberate," "intended," or even "desired" by the government. Such acts do not therefore classically fall into the category of serious evils that Section 1983 addresses.

The Fourth Circuit eloquently summed up this principle when it stated "[t]o hold that negligent handling of the [Covenant] application amounts to a constitutional violation by the City would only trivialize the fundamental rights the First Amendment was meant to protect." PA p. 32a.

Covenant's real objection is that the Fourth Circuit when it followed the lead of this Court and held that the better way to ferret out censorial activity in this context is through *ad hoc* review of individual cases. This approach accomplishes two important goals. *First*, dealing with abuses on an *ad hoc* basis is effective in assuring that censorship and intentional delay are sanctioned. *Thomas*, *supra*, 534 U.S. 316, 325 (2002) ("[W]e think that this abuse must be dealt with if and when a *pattern* of unlawful favoritism appears. . . ." (italic added.)) *Ad hoc* review in this type of situation thus

assures that constitutional rights will be vindicated. *Second*, the Fourth Circuit's approach follows the oft-expressed jurisprudential desire to avoid ruling on hypothetical abuses. *Id.* As related above, the Fourth Circuit specifically looked for, but found no evil motive or intent to deprive Covenant of its constitutional rights, and no facts indicating a scheme to indefinitely delay a decision. Both goals — punishing bad behavior and avoiding hypothetical abuses — are achieved by the Fourth Circuit's approach in this case.

## V. THIS IS NOT AN APPROPRIATE CASE TO RECONSIDER *THOMAS*

If the Court should be inclined to reconsider or elucidate the meaning of *Thomas* and / or *FW/PBS*, this case is not the appropriate vessel.

*First*, the fact that Covenant was operating illegally without a business license raises the question of whether this corporate entity should be allowed to complain at all. JA pp. 153-154 (affidavit of Business License Administrator confirming that no business may operate within North Charleston without a business license and confirming that any operation by Covenant Media was illegal). Nothing in the City's sign ordinance changed the legality of Covenant's commercial sign activities, since the LLC could not legally engage in such business even if the City had no sign ordinance. *Trinity Outdoor v. Rockville* MD, 123 Fed.Appx. 101, 105 (4th Cir. 2004) (billboard company had no standing because at the time it submitted permit applications it had not complied with the requirement of a business license.)

*Second*, Covenant has unclean hands with respect to the delay it experienced. If Covenant had been sincerely interested in a prompt response it would have inquired with the City, even just once, about the delayed response. Instead, it sat by silently and allowed the delay to build before filing its lawsuit without warning. Similarly, had Covenant desired a prompt response after filing suit, it could have provided the City with a copy of the lost application expeditiously rather than waiting six months and then complaining about the delay. PA p. 29a. Covenant should not be heard now trumpeting the length of a delay to which it was at least an equal contributor.

*Third*, the delay experienced by Covenant in this case is not traceable to absence of a specified time frame in the ordinance. It would have occurred whether the ordinance contained such a provision or not. The application was lost through simple negligence. Under this circumstance, Covenant would have received no faster response even if the ordinance had listed a time limit. Given the negligent misplacement of the application, only Covenant's good faith inquiry could have shortened the time in which it received a decision. Thus, this case makes a poor candidate to announce the need for certain safeguards since the safeguard would not have changed anything on the facts of this case.

*Fourth*, this is a case totally devoid of any hint of censorial intent. The Fourth Circuit found the applicable portions of the ordinance to be content neutral. PA pp. 22a-23a. Moreover, the Court found that the loss was negligent, and accordingly that the delay was not the product of any intent to suppress speech. Thus, it falls squarely within the *Thomas* admonition to police abuses

as they materialize. On the facts of this case, neither abuse nor censorial intent is present.

*Fifth*, the delay did not prevent Covenant from posting messages of its own. The City's ordinance did not require any permit or review for the posting of a face on an existing sign structure. JA p. 206, para. 7 (Zoning Administrator averring that "[a]pplicants could, and still can, freely change message / sign copy on such signs without the necessity of seeking any City review or approval.") The delay was the *installation* of the *structure* Covenant desired to erect. No rule or law of the City would have stopped Covenant from posting any message it desired on a pre-existing structure during the time it awaited approval to construct the structure it desired.

*Finally*, the proposed sign was illegal from the moment the application was first presented. The proposed sign was so close to another pre-existing billboard as to violate the city's spacing rules — a ruling Covenant does not appeal. A decision rendered immediately at the counter would have been exactly the same as the decision which came three weeks after Covenant provided the City with a copy of the application.

Collectively, these points illustrate an important principle: an analysis by this Court of the decision time limit posed in the Petition would, on the facts of this case, constitute a purely hypothetical, advisory opinion with no impact "on the ground." Even if the Court were to hold that a decisional time limit is necessary, it would not change the district court's judgment about the permissibility of the structure in question because the separation violation — never seriously disputed — is independently conclusive.

There was never any chance of Covenant legally constructing its desired structure from the very first minute its representative walked into City Hall on December 1, 2004. Without a business license, undertaking a construction project in the City would have been illegal, and without proper spacing its application could never have been approved. Neither of these facts would have changed, whether the City had express decisional time limits listed or not. And neither of these conclusive facts would change if Covenant brought back the same application today.

## CONCLUSION

For the foregoing reasons, the Respondent City of North Charleston respectfully requests that the Petition be denied.

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IN THE UNITED STATES SUPREME COURT

COVENANT MEDIA OF SOUTH CAROLINA, LLC,

Petitioner,

v.

CITY OF NORTH CHARLESTON, SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

# PETITIONER'S REPLY BRIEF

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## INTRODUCTION

In response to Covenant Media's petition, Respondent takes the absurd position that this case is not about a prior restraint on speech or expressive conduct, but rather about the City of North Charleston's regulation of construction projects. See Brief in Opposition, p. 7. Not only is this assertion contrary to the position taken by the Fourth Circuit below, but it also contradicts decisions from this Court and the circuit courts that have explicitly held that the use of signs, including billboards, is protected by the First Amendment. Respondent's attempts to diminish the important free speech implications at issue in this case are unpersuasive.

The City's effort to construe its permitting requirement for signs as only being applicable to billboards is belied by the plain terms of its Sign Regulations. While this case certainly arises out of Covenant Media's application for an outdoor advertising sign, this does not alter the fact that the City's Sign Regulations operated as a prior restraint on practically all speech through signs.

Finally, the City's attempt to characterize the case law relied upon by Petitioner as uniform with respect to *billboards*, intentionally overlooks the fact that this Court's holding in *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S. Ct. 775 (2002), and its subsequent application in sign cases, has been extended to cases involving other speech activities, such as demonstrations and festivals. The disparity among the circuit courts as to the proper extension of *Thomas* in prior restraint cases warrants review. Therefore, Covenant Media's petition for writ of certiorari should be granted.

## I. THE FIRST AMENDMENT IMPLICATIONS OF SIGN REGULATION CANNOT BE SERIOUSLY DISPUTED.

This Court has often acknowledged that the control of the medium of speech or of the mechanism by which speech is delivered is tantamount to control of the speech itself. For example, the regulation of newsracks is subject to constitutional protections. *E.g.*, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 415, 113 S. Ct. 1505, 1509 (1993) (newsracks entitled to First Amendment protection as the "manner" by which speech is distributed); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 108 S. Ct. 2138 (1988). Signs are, of course, an even more fundamental medium of speech. *City of Ladue v. Gilleo*, 512 U.S. 43, 54-55, 114 S. Ct. 2038, 2045 (1994) (acknowledging that signs are a form of protected expression); *Metromedia v. City of San Diego*, 453 U.S. 490, 501, 101 S. Ct. 2882, 2889 (1981) ("Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages"). Thus, the City's contention that its Sign Regulations were designed only to regulate construction projects, and therefore have no impact on speech activity, is mistaken.

Such an approach ignores not only *Ladue* and *Metromedia*, but also this Court's subsequent commentary in *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118 (1984), where the Court noted,

> In this case, as in *Metromedia*, we are called upon to adjudge the constitutionality under the First

> Amendment of a local government's response to this recurring dilemma – namely, the clash between the public's aesthetic interest in controlling the use of billboards, signs, handbills, and other similar means of communication, and the First Amendment interest of those who wish to use these media to express their views, or to learn the views of others, on matters of importance to the community.
>
> In deciding this First Amendment question, the critical importance of the posting of signs as a means of communication must not be overlooked. Use of this medium of communication is particularly valuable in part because it entails a relatively small expense in reaching a wide audience, allows flexibility in accommodating various formats, typographies, and graphics, and conveys its message in a manner that is easily read and understood by its reader or viewer. There may be alternative channels of communication, but the prevalence of a large number of signs in Los Angeles is a strong indication that, for many speakers, those alternatives are far less satisfactory.

*Id.* at 819, 104 S. Ct. at 2136. In light of this Court's prior decisions involving sign restrictions, the City's cavalier attitude toward the First Amendment principles at stake here cannot be supported.

Moreover, while the Fourth Circuit incorrectly held that the North Charleston Sign Regulations – despite being a prior restraint on speech – did not need to contain any procedural safeguards because they were content-neutral, the court did recognize that billboards enjoy First Amendment protection. *Covenant Media of S. C., LLC v. City of N. Charleston*, 493 F.3d 421, 424 (4th Cir. 2007). The court noted, "[a]lthough billboards are important communication tools that convey political, social, and, most commonly, commercial messages, they create unique issues apart from their communicative function because they are 'large, immobile, and permanent structures.'" *Id.* (citing *Metromedia,* 453 U.S. at 502, 101 S. Ct. at 2889). Thus, while signs do create unique issues for municipalities to consider, the fact that they are protected by the First Amendment is beyond dispute. *E.g.*, *Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 818 (6th Cir. 2005) ("Billboards and other visual signs, it is clear, represent a medium of expression that the Free Speech Clause has long protected"); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1402-03 (8th Cir. 1995) ("signs are a form of expression protected by the Free Speech Clause").

Equally as unpersuasive is North Charleston's attempt to dismiss precedent from other circuit courts that addresses licensing schemes for other expressive activity such as adult entertainment or political demonstrations. *See* Brief in Opposition, pp. 12-14. As this Court noted in *City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 779-81, 124 S. Ct. 2219, 2223-24 (2004), "'[t]he core policy underlying *Freedman* is that the license for a ***First Amendment-protected business*** must be issued within a

reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech.'" *Id.* at 780, 124 S. Ct. at 2224 (emphasis added). Thus, the question is not what type of First Amendment-protected business activity the courts are considering, but whether the business for which a license is required is protected by the First Amendment. *Id.* This Court's decisions in *Ladue*, *Metromedia*, and *Taxpayers for Vincent* establish that the posting of signs and billboards is protected by the First Amendment. Thus, the many precedents requiring procedural safeguards during the licensing of protected speech activities, such as parades, demonstrations, and exhibitions of movies, plays, or other entertainment, are applicable.

## II. RESPONDENT'S SUGGESTION THAT THE CITY'S PERMIT REQUIREMENT APPLIES ONLY TO NON-COMMUNICATIVE CONSTRUCTION ACTIVITY IS CONTRARY TO THE TEXT OF THE REGULATION.

Equally as unpersuasive as the City's attempt to remove First Amendment protections from billboards is Respondent's attempt to assert that this Court's procedural safeguard jurisprudence does not apply in this instance because the permitting requirement was triggered by the size of the proposed physical structure and not its categorization as a sign or billboard. *See* Brief in Opposition, pp. 11-13. Not only does this Court's holding in *Discovery Network* undermine such an assertion, but the plain language of the Sign Regulations renders it ridiculous.

The Fourth Circuit noted below that the City's sign code "required that a permit be issued before a billboard could be constructed, and billboards were required to comply with certain requirements." (4a). Contrary to the City's insinuation however, billboards were not the only signs that required a permit. *See* Sign Regulations, § 7.2. Indeed, the district court correctly noted that the North Charleston regulations explicitly stated that "[n]o building, structure or sign requiring a permit or any part thereof shall be erected . . . until the required permits have been erected." (39a). Thus, the permit requirement was not triggered solely by an applicant seeking to display a billboard, but rather nearly any sign, including political or campaign signs and signs expressing religious or ideological views. *See* Sign Regulations, §§ 8-5, 8-6(c) (establishing that all signs, of whatever size, that convey off-premise messages are billboards and are required to have a permit). Moreover, any sign over 35 square feet in size, including a noncommercial sign, was required to have a permit. *Id.* Thus, the permit requirement contained in the Sign Regulations was applicable to nearly all signs. Clearly local governments should not be allowed to hold such applications indefinitely without response.

## III. THE CIRCUIT COURTS HAVE REACHED DIFFERING CONCLUSIONS AS TO THE HOLDING OF *THOMAS*.

The City asserts that Petitioner has identified no dispute among the circuit courts with respect to *Thomas* because "[t]he cases which have considered the decision time limit issue in the context of new

billboards [*sic*] permits have all rejected Covenant's position." *See* Brief in Opposition, p. 18. The City's argument is twice flawed. First, Respondent subtly attempts to recast this petition by focusing solely on the permitting of billboards rather than First Amendment-protected activity. Second, by focusing on billboards, the City ignores the growing number of cases where *Thomas* and its early progeny – including "billboard" cases like *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg*, 348 F.3d 1278 (11th Cir. 2003) – have been applied to what Respondent classifies as "cases involving communicative conduct by live human beings." The application of *Thomas* to all manner of ordinances that operate as prior restraints on speech, thereby removing the need for any procedural safeguards, is increasing. There is no justification for the notion that such applications should be able to be held indefinitely simply because a code is content-neutral.

The City's attempt to differentiate decisions involving billboards from those addressing other speech activity is mistaken. In the Tenth Circuit's opinion in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004), the plaintiff brought facial and as-applied challenges to the ordinance which required a permit to conduct a demonstration on public property. *Id.* at 1250. Relying upon *Thomas*, the Tenth Circuit held that, because the ordinance was content-neutral, it did not need to contain any time limits. *Id.* at 1259-60. The Tenth Circuit also affirmed the district court's conclusion that the plaintiff's as-applied challenge failed, finding that the roughly 240-day time period to process an application for a demonstration permit did not violate the plaintiff's rights. *Id.* at 1260-62;

*see also Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006).

Similarly, as mentioned in Petitioner's opening brief, in the Ninth Circuit's opinion in *Southern Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1138-39 (9th Cir. 2004), *Thomas* was interpreted to strip any procedural safeguard requirement from an ordinance requiring the issuance of permits for a First Amendment-protected activity. *Southern Oregon* is alarming because it relied on *Thomas* and the Eleventh Circuit's decision in *St. Petersburg* for the premise that no time limits are needed in a content-neutral licensing scheme. *Id.* at 1138; *see also Zen Music Festivals, LLC v. Stewart*, 2004 WL 1660452 (N.D. Tex. July 23, 2004) (relying on *Thomas* and *St. Petersburg* to uphold constitutionality of mass gatherings act with no time limits on processing of applications); *also Jews for Jesus, Inc. v. Port of Portland*, 172 Fed. Appx. 760, 764 (9th Cir. 2006) (applying *Southern Oregon* to hold that prior restraint for permitting speech activity in airport need not contain safeguards).

That circuit courts are applying what the City would have this Court believe are simply "billboard" decisions to government restrictions on "true" speech completely undermines Respondent's argument. There is no reason to differentiate the analysis of prior restraints on signs from other speech activities. Thus, Respondent's criticism of Petitioner's reliance on non-sign related cases to show conflict among the circuits is unfounded.

Given the contrast between the application of *Thomas* in *Southern Oregon*, *Utah Animal Rights*, and *St. Petersburg*, and the case law noted in Petitioner's opening brief – *e.g.*, *Lusk v. Village of*

*Cold Spring*, 475 F.3d 480, 492-93 (2d Cir. 2007), *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 296 n.12 (5th Cir. 2002), *Southworth v. Board of Regents*, 307 F.3d 566, 589 (7th Cir. 2002) – Respondent's effort to show uniformity among the circuits by focusing only on billboard cases fails.

Such lack of uniformity can also be seen through the Ninth Circuit's handling of the petition for rehearing en banc that was filed in *Southern Oregon*. *See Southern Ore. Barter Fair v. Jackson County*, 401 F.3d 1124 (9th Cir. 2005). While the Ninth Circuit ultimately denied the petition, seven judges from the court joined in filing a dissent from the decision to deny the petition. At the crux of the dissent was the Ninth Circuit's application of this Court's decision in *Thomas*, along with the reliance on the Eleventh Circuit's decision in *St. Petersburg*. *Id.* at 1126-29. Just as the Seventh Circuit noted in *Southworth*, the dissenters recognized,

> *Thomas* did not decide that a content-neutral time place, and manner regulation need not include any deadline for administrative review; the ordinance in *Thomas,* indeed, had such a deadline – twenty-eight days. *See* 534 U.S. at 318, 122 S. Ct. 775. Instead, the Court decided only that two *Freedman* requirements – a deadline for *judicial* review of a *censor's* decision, and the requirement that the government must initiate litigation – do not apply to content-neutral schemes. *See id.* at 321, 122 S. Ct. 775 ("Petitioners contend that the Park District, like the Board of

> Censors in *Freedman,* must initiate litigation every time it denies a permit and that the ordinance must specify a deadline for judicial review of a challenge to a permit denial. We reject those contentions.").

401 F.3d at 1126. Moreover, the dissenting judges explicitly rejected Respondent's suggestion that post-hoc relief (referred to as "ad-hoc" in Respondent's Brief) is the more appropriate forum to review problems in a permitting scheme. *Compare* Brief in Opposition, pp. 23-24, *with* 401 F.3d at 1127 ("Post-hoc relief is not a fully adequate equivalent of the right to speak when and where one chooses").

While *Southern Oregon* and *St. Petersburg* held that abuses could be adequately remedied through as-applied challenges – 372 F.3d at 1140, 348 F.3d at 1282 – as evidenced by the Tenth Circuit's opinion in *Utah Animal Rights* and the Fourth Circuit's decision below, such abuse is routinely swept under the rug as permissible under the circumstances, or merely negligence. As a result, litigants are becoming increasingly powerless to insist upon prompt decisions as to speech permits.

## CONCLUSION

The City of North Charleston's blatant disregard for the important First Amendment principles that are at stake in this case exemplifies the need for the Court to grant this petition and restore the proper balance in prior restraint jurisprudence. The increased application of the erroneous interpretation of *Thomas* threatens to

eliminate the requirement that governments make prompt decisions as to speech permits. Future applicants for newsracks, parades, signs, and many other First Amendment-protected activities will be subject to indefinite delays. Such delays will result in important speech being silenced.

Even if permitting delays are unrelated to the content of the proposed speech, the fact remains that without specific time limits an applicant's voice can be suppressed indefinitely without consequence. This result violates all of the principles cited by this Court in establishing procedural safeguards. Whether or not a sign code, a demonstration ordinance, or any other speech licensing provision requires an applicant to divulge the content of the proposed speech is simply irrelevant to the question of whether government officials should be able to assert a "pocket veto" to deny the speech activity. Officials should be required to respond to such applications within a short, definite time frame. Thus, the Court should grant this petition and bring an end to the disparate rulings among the circuits on this critical issue.

DATED this 28th day of December, 2007.

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